No. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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SUPREME COURT, U.S.

SHIRLEY DAVIS, Petitioner,

v.

OTTO E. PASSMAN, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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July 1978

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SHIRLEY DAVIS, Petitioner,

v.

OTTO E. PASSMAN, Respondent.

PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

Petitioner Shirley Davis prays that a writ of certiorari issue to review the judgment on rehearing en banc of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals, reported at 571 F.2d 793, appears at Appendix A. The opinion of the panel of the court of appeals, reported at 544 F.2d 865, appears at Appendix B. The opinion of the United States District Court for the Western District of Louisiana, which is not reported, appears at Appendix C.

JURISDICTION

A divided panel of the Fifth Circuit Court of Appeals reversed a judgment of the district court in respondent's favor on January 3, 1977. Timely petitions for rehearing and rehearing en banc were granted by order dated May 17, 1977, which appears at Appendix D. The judgment of the court of appeals on rehearing en banc was entered April 18, 1978,

and appears at Appendix E. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a cause of action for money damages may be implied directly from the fifth amendment to the United States Constitution under the rationale of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

2. If so, whether the speech or debate clause of the United States Constitution bars this action against a federal congressman who fired his office supervisor solely and expressly on the basis of her sex.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

Article 1, § 6 of the Constitution of the United States provides in pertinent part:

> ". . . for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Section 1331(a) of Title 28 of the United States Code provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . .."

STATEMENT OF THE CASE

This is a case of indisputable sex discrimination in employment. Petitioner Shirley Davis was employed by respondent Otto E. Passman, United States Congressman from the Fifth Congressional District of Louisiana, as his Deputy Administrative Assistant from February 1, 1974 through July 31, 1974. In this capacity, petitioner was responsible for general supervision of the office clerical staff. As respondent himself acknowledged, petitioner has "experience and talent" and is an "extremely capable secretary." (App. A, p. 15a n.1.) Nonetheless, respondent terminated petitioner's employment, stating in his June 21, 1974 letter of dismissal:

> "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." Id.

Petitioner has no federal or state remedy, under statute or common law, available to redress her injuries. She therefore filed this action in the United States District Court for the Western District of Louisiana on August 7, 1974 alleging that the conduct of respondent constituted sex discrimination in violation of the equal protection component of the due process clause of the fifth amendment. Petitioner requested money damages, including back pay, as well as various forms of specific relief that are now moot because respondent is no longer in office.[1/]

Respondent moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that (1) his alleged conduct -- discharging petitioner because

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1/ Respondent was defeated in the 1976 primary election and his tenure in office ended January 3, 1977.

of her sex -- did not violate the fifth amendment; (2) petitioner had no private right of action; and (3) the suit was barred by the doctrines of sovereign and official immunity. On February 26, 1975, the district court granted the motion, ruling in respondent's favor on the first two issues, but also holding that the immunity doctrines would not bar petitioner's suit. (App. C, pp. 1c-2c.)

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, reversed and remanded. (App. B.) The majority held (1) dismissal of staff by a member of Congress on the basis of sex violates the equal protection component of the fifth amendment due process clause (App. B, pp. 2b-5b); (2) petitioner has a private right of action for damages arising directly under the fifth amendment (App. B, pp. 6b-10b); (3) sovereign immunity is no bar to a damage award against the Congressman as an individual (App. B, p. 11b); (4) legislative immunity, granted by the speech or debate clause of the United States Constitution, art. I, § 6, does not extend to staff dismissals since that conduct is not within the "sphere of legislative activity" (App. B, pp. 11b-15b); and (5) a congressman enjoys no absolute immunity outside that afforded by the speech or debate clause (App. B, pp. 15b-16b). The dissenting judge concluded that the doctrine of separation of powers required affirmance of the district court's action (App. B, p. 16b).

Following rehearing en banc[2/], the court of appeals reversed the opinion and judgment of the panel in a 12-2

2/ In his petition for rehearing and rehearing en banc, respondent directed the court's inquiry only to the questions whether legislative immunity barred this action and whether a congressman's firing his office supervisor is a political question rendering the controversy nonjusticiable.

decision, and affirmed in part and vacated in part the judgment of the district court. (App. E.)

Addressing only the question whether petitioner has an implied cause of action for money damages arising directly under the equal protection component of the fifth amendment due process clause, the majority held that this Court's analysis in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), was bottomed on federal common law and the cause of action there created was "not wholly of constitutional dimensions." (App. A, p. 4a.)[3/] The court (1) looked to the jurisprudence of statutory implication as articulated in Cort v. Ash, 422 U.S. 66 (1975),[4/] to determine whether to imply a damage action of nonconstitutional dimension (App. A, pp. 5a-8a.), and (2) finding the Cort criteria unmet, held that the Constitution did not nonetheless compel the existence of a remedy in damages to vindicate the rights asserted. (App. A, pp. 8a-9a.)

Specially concurring, Judge Jones expressed the view that the doctrine of separation of powers, operating through the speech or debate clause of the Constitution, provided

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3/ In Bivens, this Court held that a private action for money damages arises directly under the fourth amendment to the United States Constitution, 403 U.S. at 389; that the federal claim based upon unconstitutional conduct by a federal agent is independent of any state tort claim which might be raised, id. at 394-95; and that money damages are a "remedial mechanism normally available in the federal courts," id. at 397. Bivens had claimed that his fourth amendment right to be secure against unreasonable search and seizure had been violated by agents of the Federal Bureau of Narcotics acting under color of federal authority, and that this unconstitutional conduct gave rise to a federal cause of action for money damages.

4/ In Cort, this Court addressed the question whether a cause of action for money damages could be implied under a federal statute, setting forth four criteria as a basis for making such determinations. See nn.12-13, infra, and accompanying text.

absolute immunity to the congressman. (App. A, pp. 9a-10a.) In a separate special concurrence, Judge Roney stated that in his view the Bivens rationale was premised on the nature of the personal right asserted, and that a constitutional cause of action for money damages should be implied only where the damage remedy is rooted in pre-constitutional notions of tort law. (App. A, pp. 10a-14a.)

In dissent, Judge Goldberg, joined by Chief Judge Brown, concluded that Bivens, a decision of constitutional magnitude, mandated the implication of a cause of action here. (App. A, pp. 16a-24a.) In his view, that decision held that the Constitution compels some remedy for a petitioner whose constitutional rights have been violated. While Congress may substitute remedies for a constitutionally-based cause of action, it may not eliminate all means of vindicating a federal constitutional right. (App. A, pp. 31a-32a.) Additionally, he believed that a proper application of Cort v. Ash to a constitutional claim would justify implication of a cause of action for money damages directly from the fifth amendment on the facts of this case. (App. A, pp. 19a, 24a-30a.)

REASONS FOR GRANTING THE WRIT

This case presents two major constitutional questions. The first is whether a cause of action for money damages may be implied directly from the fifth amendment where there is no alternative remedy available to the petitioner. The second is whether the speech or debate clause of the Constitution bars this suit, assuming the answer to the first question is affirmative.

In reaching its decision, that no cause of action may be implied directly from the fifth amendment, the Fifth Circuit misconstrues several decisions of this Court upon which it expressly relies and puts itself in conflict with nine other circuits which have interpreted these decisions. The result is contrary to the intention of the framers in drafting the Bill of Rights. The importance of this issue -- vindication of a constitutionally guaranteed right -- makes it particularly appropriate for this Court's resolution.

A decision to permit petitioner a cause of action for money damages will necessitate a decision whether she is nonetheless barred from vindicating her rights because of the applicability of legislative immunity. Although the en banc court did not reach the immunity issue, both the panel and the district court earlier held in petitioner's favor. Whether the speech or debate clause protects a congressman from liability for unconstitutional staff dismissals is a determination of extreme importance. This Court should make that judgment.

I. The Decision Below Misconstrues the Leading Opinion of This Court, Conflicts with the Decisions of Nine Other Courts of Appeals, and Eviscerates a Fundamental Guarantee of the Bill of Rights.

The decision below would permit a United States congressman deliberately to violate petitioner's right to equal protection under the due process clause of the fifth amendment.[5/] It would render petitioner helpless to seek

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5/ It is well settled that the due process clause of the fifth amendment imposes an obligation on the federal

(footnote cont'd)

damages for unconstitutional sex discrimination by a federal legislator. In question are the constitutional rights of thousands of congressional employees.

The decision below seriously misconstrues the opinion of this Court in Bivens. The core issue in Bivens was the availability of a federal remedy for effectuating a fundamental guarantee of the Bill of Rights. Without the implication of a cause of action under the fourth amendment, the petitioner in Bivens would have had no means of seeking redress in federal court for the violation of his right to freedom from unreasonable search and seizure. In determining that a cause of action was so implied, this Court held that a remedy in money damages need not be "essential" or "indispensable" or even "necessary" to effectuate constitutional rights generally. 403 U.S. at 397.[6/] Rather, the standard for determining whether this traditional form of judicial

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government and its officials to afford equal protection of the laws. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954). In the instant case, petitioner has clearly alleged discrimination based on a scheme of classification, thereby meeting the requirement of a valid equal protection claim. Washington v. Davis, 426 U.S. 229 (1976); Snowden v. Hughes, 321 U.S. 1 (1944).

6/ "[W]e cannot accept respondent's formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injuries through a particular remedial mechanism normally available in the federal courts. . . . 'The very essence of civil liberty certainly consists in the right of every individual to claim

(footnote cont'd)

relief should be accorded the litigant is whether compensatory relief is "appropriate" to the vindication of the right asserted by those in his position. Id. at 406-407 (Harlan, J., concurring.)[7/] See also Turpin v. Mailet, No. 77-7345 (2d Cir. June 5, 1978) (en banc) (rejecting the analysis of the court below and holding Bivens applicable to a cause of action arising under the fourteenth amendment due process clause).[8/] The constitutional claim is independent of any state law violation, and the federal remedy in damages for an invasion of personal interests has been sanctioned by the

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(footnote cont'd)

the protection of the laws, whenever he receives an injury.'" Bivens, supra, 403 U.S. at 397, quoting Marbury v. Madison, 1 Cranch 137, 163 (1803) (citations omitted).

The en banc majority's inquiries "whether the Constitution . . . compels an action for money damages implied directly from the fifth amendment Due Process Clause" and "whether, in this case, a damage action is indispensable to [its] effectuation", App. A, p. 8a (emphases added), are in direct conflict with this Court's standards.

7/ "The focus should . . . be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought; as in [J.I.Case Co. v. Borak, 377 U.S. 426 (1964)], the fact that persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress."

Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1551 (1972).

8/ "In most instances . . . courts are free to imply remedies where the relief requested is merely appropriate to the vindication of the interest asserted. When one analyzes Bivens, he is driven to the conclusion that Bivens decided that precise issue. The Court refused to accept the premise that a remedy must be necessary or indispensable to warrant its implication . . .." Turpin v. Mailet, supra, slip op. at 8 (emphasis added), citing Bivens, supra, 403 U.S. at 397.

courts in the absence of affirmative action by Congress creating alternative but equally effective remedies. 403 U.S. at 392, 395, 396, 397.

The lower court failed to recognize the constitutional significance of Bivens and to apply its rationale to the facts here presented. Instead, the court relied on its determination that Bivens was based on federal common law and applied to a constitutional claim the criteria for implying a cause of action from a federal statute. This was error.

The damage remedy here is both "necessary" and "appropriate" to vindication of the rights asserted. The court below applied an erroneous standard in deciding that this remedy was not "constitutionally compelled." (App. A, pp. 8a-9a.) The facts argue even more strongly for a judicially-created remedy in the instant case than in Bivens. There, the petitioner could have brought a tort action in state court against the federal agents who had infringed his fourth amendment rights. Petitioner in this case has no cause of action under Louisiana law, and she is foreclosed from equitable relief since respondent is no longer in office. Her only means of vindicating her constitutional right is an action for money damages arising directly under the fifth amendment.

Moreover, in refusing to recognize a constitutionally compelled remedy for violation of the right to due process, the Fifth Circuit is alone among the six circuit courts which have confronted the issue. Five circuits have specifically applied the Bivens rationale to actions arising under the due process provisions of either the fifth or fourteenth

amendments,[9] one of them subsequent to the decision below.[10] These courts have adhered to the reasoning of the Ninth Circuit, which in Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1364 (9th Cir. 1978), amending on denial of rehearing, 558 F.2d 928 (9th Cir. 1977), concluded: "The due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment. Nothing in Bivens warrants limitation to Fourth Amendment claims; its rationale clearly supports extension . . .." Four other courts of appeals have either applied Bivens to claims arising under other constitutional amendments or have indicated their willingness to do so.[11]

9/ Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1364 (9th Cir. 1978), amending on denial of rehearing, 558 F.2d 928 (9th Cir. 1977) (fifth amendment); Gentile v. Wallen 562 F.2d 193, 196-97 (2d Cir. 1977) (fourteenth amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); United States ex rel. Moore v. Koelzer, 457 F.2d 892, 893-94 (3d Cir. 1972) (fifth amendment due process and fourth amendment). The Eighth Circuit's determination that a cause of action is implied under the fourteenth amendment and that a municipality may be sued for money damages under a vicarious liability theory, Owen v. City of Independence, 560 F.2d 925, 932-34 (8th Cir. 1977), was recently vacated and remanded for further consideration, 46 U.S.L.W. 3792 (U.S. June 26, 1978), in light of this Court's holding that a municipality cannot be subjected to liability under a respondeat superior theory in Monell v. New York City Dept. of Social Services, 46 U.S.L.W. 4569 (U.S. June 6, 1978). See n.26, infra. See also Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), cert. denied, 404 U.S. 1061 (1972) (fourth and fifth amendments). Cf. Bennett v. Campbell, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of Bivens claims under fourth and fifth amendments); Gray v. Union County Intermediate Education District, 520 F.2d 803, 805 (9th Cir. 1975) (apparently assuming availability of cause of action for back pay and damages for violation of first amendment and due process rights).

10/ Turpin v. Mailet, supra, slip op. at 7: "Bivens, if anything, established that damages could flow from injuries caused by an invasion of other [than fourth amendment] constitutional provisions."

11/ The District of Columbia and Sixth Circuits have not yet confronted the due process question, but both

(footnote cont'd)

The court below, however, viewed Bivens differently than did the other circuits, failing to recognize the significance

(footnote cont'd)

courts have applied the Bivens rationale to first amendment actions. See Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (U.S. July 3, 1978) (No. 77-955); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975). The Third Circuit has also upheld a cause of action under the first amendment. See Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975). See also Payne v. District of Columbia, 559 F.2d 809, 818-19 (D.C. Cir. 1977) (fifth amendment jurisdiction, favorable dicta on cause of action); Sullivan v. Murphy, 478 F.2d 938, 965 & n.47 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973) (fourth and fifth amendment jurisdiction, favorable dicta on cause of action). The Seventh and Tenth Circuits have not yet directly confronted the question of an implied cause of action under an amendment other than the fourth, but both have commented favorably on the issue. See McDonald v. Illinois, 557 F.2d 596, 604 (7th Cir.), cert. denied, 98 S. Ct. 508 (1977) (denying relief on vicarious liability theory but stating, "A cause of action (without benefit of 42 U.S.C. § 1983) may be implied in favor of one who suffers injuries as a result of a government agent's violation of the Constitution"); Cannon v. University of Chicago, 559 F.2d 1063, 1082 (7th Cir. 1977), cert. granted, 46 U.S.L.W. 3803 (U.S. July 3, 1978) (No. 77-926) (denying implied remedy under a federal statute but indicating position would have differed had case involved a fundamental constitutional right); Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 718 n.7 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976) (suggesting availability of cause of action under fourteenth amendment but denying relief); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 577-78 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976) (fourteenth amendment due process jurisdiction, favorable dicta on cause of action); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 (10th Cir. 1975) (equal protection and due process jurisdiction, favorable dicta on cause of action.)

The Fifth Circuit, prior to its en banc decision in petitioner's case, had found jurisdiction present where Bivens-type actions were brought under constitutional provisions other than the fourth amendment. App. A, p. 3a. See Reeves v. City of Jackson, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under eighth amendment and/or fourteenth amendment, granting jurisdiction); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976) (fifth amendment jurisdiction); see also Roane v. Callisburg Independent School District, 511 F.2d 633, 635 n.1 (5th Cir. 1975); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 801-02 & n.2 (5th Cir. 1974); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). But see Rodriguez v. Ritchey, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc) (declining to address Bivens issue).

The one remaining court of appeals -- the First Circuit -- has refused to imply a cause of action against a municipality

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of the absence of alternative remedies. In an attempt to apply the principles of statutory implication[12] articulated by this Court in Cort v. Ash,[13] the court of appeals

(footnote cont'd)

under the fourteenth amendment. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977). However, as Judge Goldberg noted in his dissent below, App. A, pp. 29a-30a & n.21, this case involved a municipal "deep pocket defendant," sued under a vicarious liability theory. The First Circuit held that plaintiff could maintain an action under 42 U.S.C. § 1983 against those persons directly responsible for his injuries and rested its decision on the adequacy of that remedy. (This situation will no longer arise given this Court's recent decision in Monell v. New York City Dept. of Social Services, supra. See n.26, infra.)

These are not all of the cases in which courts of appeals have touched upon the Bivens issue. Rather, these are the cases which have addressed the Bivens question most directly. An overwhelming number of district courts have also applied the Bivens rationale to claims arising under constitutional provisions other than the fourth amendment. See, e.g., Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) ("Bivens recognizes a cause of action for damages for violations of any constitutionally protected interest"); Rodriguez v. Barcelo, 358 F. Supp. 43, 48 (D.P.R. 1973) ("if [defendants] are federal employees, then, under Bivens, there is an action whenever a federally guaranteed right is violated"); Washington v. Brantley, 352 F. Supp. 559, 563-64 (M.D. Fla. 1972) ("Bivens recognizes a cause of action for any constitutionally protected interest"). See also Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975) (first and fourteenth amendments); Peacock v. Board of Regents, 380 F. Supp. 1081 (D. Ariz. 1974), aff'd, 510 F.2d 1324 (9th Cir.), cert. denied, 422 U.S. 1049 (1975) (first amendment); Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973) (eighth amendment); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973) (first, fourth and fifth amendments).

12/ The standard for implication of statutory remedies, first articulated in J.I. Case Co. v. Borak, was whether a remedy is "necessary" and "appropriat[e]," 377 U.S. at 433, 434, to effectuate the federal statute. In Bivens, this Court declined to require that the remedy sought be "necessary to enforce the Fourth Amendment." 403 U.S. at 397. See pp. 8-10 and nn.6-8, supra. Citing both these earlier precedents, this Court articulated the current standard in Cort v. Ash: the remedy must be consistent with the purpose of the legislation and not "inappropriate" as a basis for a federal cause of action. 422 U.S. at 78.

13/ Cort articulated four criteria to be considered in determining whether a remedy is implied under a federal statute: (1) whether plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there are any indications of legislative intent, explicit or implicit, to create or deny a remedy; (3) whether implication of the remedy would be consistent with the underlying purpose of the legislative scheme; (4) whether

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questioned whether Congress intended to preclude noncompetitive congressional employees from pursuing judicial remedies for sex discrimination by its silence on this subject in Title VII of the Civil Rights Act of 1964, as amended, and its broad mandate regarding discharge of congressional staff in 2 U.S.C. § 92.[14/] The answer was supplied by Judge Goldberg dissenting below: "Where, as here, no alternative has been made available, that inquiry is simply irrelevant. . . . There is no suggestion in Bivens that Congress can negate the existence of every remedy which might vindicate a constitutional right."[15/] App. A, pp.

(footnote cont'd)

the cause of action was traditionally relegated to state law and would be inappropriate for a cause of action solely under federal law. 422 U.S. at 78.

The second factor is discussed in the text. With respect to the first, the lower court conceded, "The fifth amendment Due Process Clause surely exists for the 'especial benefit' of Davis, as Cort required," App. A, p. 5a. The third Cort criterion -- that the remedy be "consistent with the underlying purposes of the legislative scheme" -- is clearly met in this case. Without a means of effectuating its guarantees, the Bill of Rights has only declaratory value. Finally, the fourth factor is also satisfied in that it would not be "inappropriate to infer a cause of action based solely on federal law" to effectuate the fifth amendment. If there is no such cause of action, then the protection afforded by the Bill of Rights must depend on the vagaries of state law, a result contrary to both the intent of the framers, see n.19 infra, and the teachings of Bivens, 403 U.S. at 394-95. There is no state remedy here.

14/ 2 U.S.C. § 92 provides generally for the "payment of appropriations for clerk hire for Members, Delegates, and Resident Commissioners" of the House of Representatives and the number of such "clerks" to which each is entitled. Its proviso states "[t]hat such persons shall be subject to removal at any time by such Member, Delegate, or Resident Commissioner with or without cause."

15/ Moreover, no such negative intent need be imputed to Congress.

> "[T]he traditional deference of Congress to the Supreme Court in safeguarding individual liberties makes it both less likely that Congress will act affirmatively to implement the Bill of Rights, and improbable that congressional silence indicates a desire to retain state law."

Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 18-19 (1975).

22a, 26a (emphases in original). Congress is free to create alternative remedies that are equally effective, in its judgment, for vindication of petitioner's fifth amendment right. Bivens, supra, 403 U.S. at 397. It cannot -- either by legislation or by silence[16/] -- render the Constitution applicable to and enforceable against everyone but its own Members. Indeed, Congress has spoken affirmatively on this issue, declaring unambiguously that employees of its Members shall not be discriminated against.[17/] The error of the lower court is compounded by its refusal to consider this clear directive.

If the judiciary is to remain the guardian of our constitutional liberties, it cannot -- as the court below would do -- eviscerate them by permitting them to become mere rights with no remedies. It was clearly the intent of

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16/ "[L]egislative silence can in [no] way be viewed as an expression of congressional 'intent,' let alone the sort of 'explicit congressional declaration' required by Bivens." Turpin v. Mailet, supra, slip op. at 17. See also Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage.")

17/ 5 U.S.C. § 7151, enacted in 1966, provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin" (emphasis added).

The term "employee" is defined in 5 U.S.C. § 2105(a)(1)(B) to mean:

> ". . . an individual who is -- (1) appointed in the civil service by one of the following acting in an official capacity --
>
> * * *
>
> (B) a Member or Members of Congress, or the Congress . . .."

In turn, 5 U.S.C. § 2101(1) defines the term "civil service" as used in 5 U.S.C. § 2105(a)(1) to include:

> ". . . all appointive positions in the executive, judicial, and legislative branches of the Government of the United States. . . ."

the framers that the provisions of the Bill of Rights apply to all branches and officials of the federal government. The first ten amendments to the Constitution were enacted for the very purpose of preventing encroachment upon individual rights by the federal government, especially by the legislative branch.[18] In Bivens, this Court recognized that the fourth amendment limits the exercise of power by the federal government regardless of the laws of the state in which it is operating. 403 U.S. at 392. To effectuate the intent of the framers it is necessary to read the fifth amendment similarly and to imply a cause of action thereunder. By incorporating the guarantees of the Bill of Rights into the Constitution, rather than leaving their codification to the whim of state governments,[19] the framers sought to ensure that the judiciary would defend them. As Madison said:

18/ "[T]he great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights . . . ." 1 Annals of Cong. 450 (Gales & Seaton eds. 1789) (James Madison before the 1st U.S. Congress, 1st Session) (hereinafter cited as Annals). Conferring far-reaching powers upon the federal government was perceived as a grave danger by many Americans who viewed state governments as the defenders of popular liberty and the proper repositories of the great powers of government. Nearly all of the state ratifying conventions passed resolutions recommending amendments guaranteeing various rights against infringement by federal authority. From these resolutions, James Madison drafted the bill he presented to Congress on June 8, 1791.

In presenting the Bill of Rights to Congress, Madison stated:

> "In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker. It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control." Annals at 454 (emphasis added).

19/ Madison observed that leaving fundamental guarantees of the Bill of Rights to the idiosyncracies of state governments was "too uncertain ground to leave this provision upon . . . ." Annals at 456.

> "If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[20]

The error of the court below is even more striking in light of the disparate treatment it would accord those whose rights are violated by state rather than federal legislators. As a consequence of the decision below, the former would have a cause of action under 42 U.S.C. § 1983,[21] while the latter

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20/ Annals at 457.

21/ 42 U.S.C. § 1983 (1970), originally included as section 1 of the Civil Rights Act of 1871, provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State legislators are, of course, absolutely immune from liability for actions within the legitimate sphere of legislative activity under the speech or debate clause of the United States Constitution. Tenney v. Brandhove, 341 U.S. 367 (1951). See part II, pp. 20-23, infra. When their conduct is not so protected, however, they are subject to suit under 42 U.S.C. § 1983. Ammond v. McGagh, 390 F. Supp. 655 (D.N.J. 1975), rev'd on other grounds, 532 F.2d 325 (3d Cir. 1976) (§ 1983 actions for first and fourteenth amendment violations permissible against twenty-eight New Jersey state senators and other legislative officials). See also Johnson v. Reagan, 524 F.2d 1123, 1124 (9th Cir. 1975); Parker v. McKeithen, 488 F.2d 553, 555 (5th Cir.), cert. denied, 419 U.S. 838 (1974); Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973), all holding 42 U.S.C. § 1983 applicable to state legislators but granting immunity from suit since the contested activities fell within the ambit of the speech or debate clause.

would have no federal remedy. This anomalous result would wholly distort the intent of the framers of the Bill of Rights and that of Congress in enacting section 1983. The legislative history of the statute demonstrates that it was intended to extend the same rights and remedies to victims of constitutional violations by state officers -- "whether that action be executive, legislative, or judicial"[22/] -- as were already available against federal officials.[23/] In passing section 1983, Congress believed it was "really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess. 569 (1871) (emphasis added).[24/] "There is no reason to allow federal officials to act with impunity in this context and to bar state officials. The damage to the individual's [constitutional]

22/ Mitchum v. Foster, 407 U.S. 225, 242 (1972), quoting Ex Parte Virginia, 100 U.S. 339, 346 (1879).

23/ This Court has recently refused to "draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 46 U.S.L.W. 4952, 4959 (U.S. June 29, 1978) (holding federal officials entitled to qualified, rather than absolute, immunity from suits charging unconstitutional conduct). The analogue is equally applicable in the instant case.

24/ It was not until the Act of March 3, 1875 that Congress enacted the predecessor to 28 U.S.C. § 1331(a), the broad jurisdictional grant to the federal courts under which Bivens causes of action are entertained. Although there is virtually no legislative history of the Act, it is well settled that by that statute, "Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts . . . became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927), quoted in Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis added in part). See also id. at 246-47 n.8. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." Id. at 248. Accord, District of Columbia v. Carter, 409 U.S. 418, 427-29 (1973); Lynch v. Household Finance Co., 405 U.S. 538, 546-48 (1972).

interests is the same regardless of the perpetrator of the violation." Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975) (upholding a Bivens cause of action under the first amendment).[25/]

Finally, there is no warrant for the lower court's suggestion that recognition of an implied cause of action under the fifth amendment would be judicially unmanageable. No new "floodgates" will be opened by a decision applying the Bivens rationale to causes of action arising under constitutional amendments other than the fourth; neither should it be anticipated that other members of Congress will blatantly violate the constitutional rights of their employees. In the eight years since this Court decided Bivens, nine circuits have applied the Bivens rationale to actions arising outside the fourth amendment, or have indicated their willingness to do so. See nn.9-11, supra. The cases decided there, as well as in the district courts, have vindicated the federal civil rights of the litigants without unduly burdening the federal forum.[26/]

25/ Citing Paton v. La Prade, supra, this Court has echoed that analysis in Butz v. Economou, supra. "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under § 1983 . . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." 46 U.S.L.W. at 4958, 4959.

26/ This Court's recent decision in Monell v. New York City Dept. of Social Services, 46 U.S.L.W. 4569 (U.S. June 6, 1978), overruled Monroe v. Pape, 365 U.S. 167 (1961). Monell permits 42 U.S.C. § 1983 suits against municipalities, except those based on vicarious liability theories, for alleged unconstitutional actions implementing government policy or custom. This decision will eliminate many attempts to bring claims under the fourteenth amendment that would not have been cognizable under § 1983. Thus the fear of the court below, insofar as it concerns an increased number of fourteenth amendment claims, see App. A, pp. 7a-8a, should be alleviated. See also Bivens, supra, 403 U.S. at 391 n.4.

II. The Legislative Immunity Provided By The Speech or Debate Clause Does Not Protect Respondent From Suit.

If this Court holds that petitioner has a private cause of action for money damages arising under the fifth amendment, the issue whether respondent can still cloak himself with absolute immunity from suit becomes one of controlling importance.[27/] Having won the right to proceed, petitioner will still be prevented from securing redress for her injuries if respondent is entitled to absolute legislative immunity. If a qualified immunity is applicable, petitioner can still proceed to trial on the merits and respondent can attempt to present a good faith defense. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). The issues presented are substantial. This Court is the proper forum for their resolution.

The only immunity doctrine which respondent can seriously seek to invoke is that of legislative immunity, founded in the speech or debate clause of the United States Constitution. Although at various points in the proceedings below the respondent has asserted that sovereign or absolute official immunity should apply, those contentions are patently without merit.[28/]

27/ In the proceedings below, both the district court and the panel of the Fifth Circuit Court of Appeals held that no immunity doctrine would bar this action. Although the question whether art. 1, § 6, the speech or debate clause of the United States Constitution, protects the congressman from judicial inquiry was expressly framed for rehearing, the en banc court of appeals did not address the issue.

28/ As to the claim of sovereign immunity, petitioner sues respondent in his individual capacity. No relief against the United States has been requested nor could be substantiated. This action is now limited to a claim for money damages which will be assessed against respondent personally. The sovereign immunity doctrine is inapplicable since no recovery against the United States Treasury is contemplated.

(footnote cont'd)

It is well-established that the speech or debate clause has "finite limits." Doe v. McMillan, 412 U.S. 306, 317 (1973). This Court has nine times been faced with determining where the boundaries of the clause in fact lie.[29/] Although the literal core of legislative immunity is "speech or debate in either House," its protection has been extended beyond its literal terms to include those activities "essential to legislating." Gravel v. United States, 408 U.S. 606, 621 (1972). This Court has read the clause "broadly to effectuate its purposes," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975), but it has been ever mindful of those purposes and has cautioned against broadening the scope of the clause to a grant of personal prerogative. The decision to discharge an office supervisor on the basis of her sex is not an action which is an "integral part" of the legislative process. Gravel v. United States, supra, 408 U.S. at 625. To extend the boundaries of the protection to conduct so removed from the legislative process would controvert both the historical

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(footnote cont'd)

As to the claim of absolute official immunity, this Court has held that in the case of federal legislators, any common law privilege against legal suit was incorporated into the Constitution as art. I, § 6, Tenney v. Brandhove, supra, 341 U.S. at 376, 379, and the immunity provided is coextensive with that of the speech or debate clause, Doe v. McMillan, 412 U.S. 306, 324 (1973). Even were this Court to depart from precedent and accord respondent an immunity different from that afforded legislators by the speech or debate clause, that immunity would not be absolute, but must be limited to a good faith defense at trial. Butz v. Economou, 46 U.S.L.W. 4952 (U.S. June 29, 1978).

29/ Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan; Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove; Kilbourn v. Thompson, 103 U.S. 168 (1880).

mandate of the framers and subsequent judicial interpretation of the clause.

The purpose of the speech or debate clause was not to grant a perquisite of office to individual members of Congress. Rather, the framers sought to ensure the independence of the Legislative Branch. The clause is in essence a statement of separation of powers rather than a grant of unfettered privilege. United States v. Brewster, 408 U.S. 501, 507-09 (1972); Eastland v. United States Servicemen's Fund, supra, 421 U.S. at 502; United States v. Johnson, 383 U.S. 169, 181 (1966); Gravel v. United States, supra, 408 U.S. at 617-18. It protects the legislator only in his legislating capacity.

This Court has consistently held that only actions "in the sphere of legitimate legislative activity" are protected. Tenney v. Brandhove, supra, 341 U.S. at 376. Beyond literal speech or debate, the clause protects activities taking place "in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1880). Such activities must be "things generally said or done in the House or the Senate in performance of official duties," United States v. Brewster, supra, 408 U.S. at 512, and must be "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, supra, 408 U.S. at 625.

An activity does not qualify for speech or debate protection merely because it is in some remote or tangential

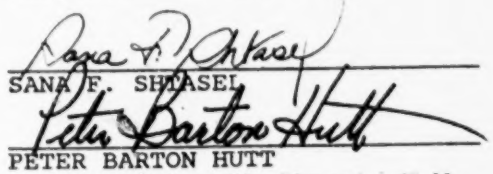
way "related" to the legislative process. United States v. Brewster, supra, 408 U.S. at 516. Neither are all activities "regularly" done by members of Congress coterminous with legislative activity protected by the clause. Doe v. McMillan, supra, 412 U.S. at 313. The firing of petitioner, solely on the basis of gender, has nothing to do with the legislative process. Petitioner was in no way related to the legislative or policy aspects of respondent's office. Indeed, respondent himself described her work as secretarial in nature. App. A, p. 15a n.1. Nor was respondent's stated reason for discharging petitioner remotely related to legislative or policy considerations. Respondent was acting not as a legislator, but as an employer. Upholding this cause of action in no way undermines the purposes or protections of the speech or debate clause.

CONCLUSION

The critical facts of this case are not in controversy. It is the questions whether petitioner should be permitted to enforce her constitutional rights against a United States congressman in federal court and, if so, whether that congressman is protected by constitutionally mandated legislative immunity which require resolution. The questions involved are important, and the lower court, in rejecting the reasoning of the other circuits, has interpreted this Court's decisions in a manner the Constitution cannot sustain.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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July 1978

A P P E N D I C E S

APPENDIX A

DAVIS v. PASSMAN

Shirley DAVIS, Plaintiff-Appellant,

v.

Otto E. PASSMAN, Congressman of the United States, Defendant-Appellee.

No. 75-1691.

United States Court of Appeals, Fifth Circuit.

April 18, 1978.

Action was brought against member of United States House of Representatives, alleging that he violated the Fifth Amendment by discharging female staff member because of her sex. The United States District Court for the Western District of Louisiana, Tom Stagg, J., dismissed and former staff member appealed. The Court of Appeals, Goldberg, Circuit Judge, 544 F.2d 865, reversed and remanded, and court granted rehearing en banc. The Court of Appeals, Charles Clark, Circuit Judge, held that congressional staff member allegedly discharged by former Congressman because of her sex had no private cause of action against former Congressman for money damages under due process clause of Fifth Amendment, in view of fact that Constitution did not compel an action for money damages implied from due process clause, Congress avoided creating action for money damages for congressional aides in noncompetitive positions, and implying such a damage action would necessarily draw into the federal judiciary system a wide range of cases whose resolution Congress had not committed to federal judiciary and whose resolution was better suited to courts of general jurisdiction.

Affirmed in part, and vacated in part.

Jones, Circuit Judge, concurred specially and filed opinion.

Roney, Circuit Judge, concurred specially and filed opinion.

Goldberg, Circuit Judge, dissented and filed opinion in which Brown, Chief Judge, joined.

1. Action ⇐3

Courts consider several factors in determining whether to imply a cause of action from a statutory right: whether provision asserted creates a special right in the plaintiff; whether action of Congress in field indicates intent to allow such remedy or at least an intent not to deny the remedy; whether implication of remedy would be consistent with purpose of right asserted, and whether cause of action implied would be one appropriate for federal law.

2. Federal Courts ⇐177

Not every right that conceivably could be wedged within literal breadth of due process demands federal protection through a cause of action for monetary damages. U.S.C.A.Const. Amend. 5.

3. Federal Courts ⇐178

Congressional staff member allegedly discharged by former Congressman because of her sex had no private cause of action against former Congressman for money damages under due process clause of Fifth Amendment, in view of fact that Constitution did not compel an action for money damages implied from due process clause, Congress avoided creating action for money damages for congressional aides in noncompetitive positions, and implying such a damage action would necessarily draw into the federal judiciary system a wide range of cases whose resolution Congress had not committed to federal judiciary and whose resolution was better suited to courts of general jurisdiction. U.S.C.A.Const. Amend. 5.

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Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, Chief Judge, JONES, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

In today's decision the court en banc reverses a panel opinion which implied a cause of action for money damages from the Due Process Clause of the fifth amendment of the Constitution.[1]

In her complaint, Ms. Shirley Davis alleged that former Louisiana Congressman Otto Passman dismissed her as his Deputy Administrative Assistant solely because she was a woman and he wanted a man in the position. Davis claimed Passman's actions violated the equal protection component of the fifth amendment Due Process Clause. Invoking the court's jurisdiction under 28 U.S.C.A. § 1331(a), she sought specific relief, damages, and declaratory relief. Because Passman's service in Congress ended after the suit was brought, the claim has narrowed to one for recovery of money damages. The district court based its dismissal of the complaint on alternative grounds: (1) that the law affords Davis no private right of action and (2) that the conduct of which she complained did not violate the Constitution. Addressing only the surviving claim for money damages, we affirm the district court's dismissal on the first ground.

The roster of constitutional rights which have been held to support implied damage actions began its growth with the Supreme Court's seminal decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Court noted that historically damages have been regarded as the "ordinary remedy for an invasion of personal interests in liberty," and implied a cause of action for money damages for the invasion of the plaintiff's liberty which abridged his fourth amendment rights. 403 U.S. at 395, 91 S.Ct. at 2004, 29 L.Ed.2d at 626.

Although the Supreme Court has neither extended nor further explained its initial position, many inferior federal courts have cited *Bivens* as authorizing implied actions for money damages based on constitutional rights other than the fourth amendment.[2] Generally, these decisions have recognized implicitly that *Bivens* has some yet unreached limits. Only isolated district court decisions have asserted that *Bivens* created damage actions for violation of constitution-

1. The opinion of the panel, 544 F.2d 865 (5th Cir. 1977), had, in turn, reversed the district court's dismissal of a complaint filed by a discharged female congressional employee.

2. Apart from the Due Process Clauses, lower federal courts have looked favorably upon *Bivens* actions based upon the first, sixth, eighth, ninth, and thirteenth amendments. *See, e. g., Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments); *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (first amendment); *Jihaad v. Carlson*, 410 F.Supp. 1132 (E.D.Mich.1976) (first and eighth amendments); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144, 160-62 (D.D.C. 1976) (first and sixth amendments); *Patmore v. Carlson*, 392 F.Supp. 737 (E.D.Ill.1975) (fifth and eighth amendments). *See also* M. Lehmann, Bivens *and Its Progeny*, 4 Hastings Const. L.Q. 531, 566-72 (1977).

rights as broadly as if it had decreed that 42 U.S.C.A. § 1983 applied to the federal government.[3] This appeal requires either that we join other circuits in projecting the scope of *Bivens* to the Due Process Clauses of the fourteenth and fifth amendments,[4] or decline to follow their precedents. A choice is not foreclosed. In more than one decision the Supreme Court specifically has pointed out that this issue remains open.[5]

Our own decisions appear equivocal on this point. We have ruled district courts erred in finding no jurisdiction to consider damage claims based upon implied causes of action under the Due Process Clauses of both the fifth amendment, *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976), and the fourteenth amendment, *Reeves v. City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976). *See also Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n.1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801–02 & n.2 (5th Cir. 1974); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). However, in *Rodriguez v. Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc), we expressly declined to speak as an en banc court on the appropriateness of extending *Bivens* beyond the fourth amendment. Now we find ourselves face-to-face with the necessity to take a firm position.

3. *E. g., Saffron v. Wilson*, 70 F.R.D. 51, 53 n.1 (D.D.C.1975) ("This holding [*Bivens*] has been interpreted almost unanimously as recognizing a cause of action for damages for violation of any constitutionally protected interest."); *Gardels v. Murphy*, 377 F.Supp. 1389, 1398 (N.D. Ill.1974) ("*Bivens* recognizes a cause of action for damages for violation of any constitutionally protected interest.")

4. Several circuits have allowed plaintiffs to base *Bivens* implied actions solely upon the concept of due process: the Second Circuit, *Gentile v. Wallen*, 562 F.2d 193, 196 (2d Cir. 1977) (fourteenth amendment); the Third Circuit, *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); *but see Malhone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (declining to allow cause of action on fourteenth amendment alone); the Fourth Circuit, *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1156–57 (4th Cir. 1974) (fifth amendment); the Seventh Circuit, *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 718–19 & n.7 (7th Cir. 1975) (denying relief, but holding action could be brought solely under fourteenth amendment); the Eighth Circuit, *Owen v. City of Independence*, 560 F.2d 925, 932 (8th Cir. 1977) (fourteenth amendment in suit seeking back pay); the Ninth Circuit, *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 936–37, 941–43 (9th Cir. 1977) (one cause of action available on fifth amendment just compensation clause and another on fifth amendment due process clause).

   Other circuits have commented favorably upon extension of *Bivens* to actions implied from the concept of due process: the Tenth Circuit, *e. g., Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 932 & n.5 (10th Cir. 1975) (apparently referring to the fifth amendment); the D.C. Circuit, *e. g., Lewis v. D.C. Dep't of Corrections*, 174 U.S.App.D.C. 483, 484, 533 F.2d 710, 711 (1976).

   The First Circuit has declined to imply a cause of action against municipalities from the fourteenth amendment Due Process Clause to grant damages for wrongful death. *Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977).

5. In several cases since *Bivens*, the Supreme Court has expressly left open the question whether an action for damages might be implied from the Due Process Clauses. *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 277, 97 S.Ct. 568, 571, 50 L.Ed.2d 471, 477 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 n.3, 96 S.Ct. 2413, 2415–16 n.3, 49 L.Ed.2d 276, 280 n.3 (1976); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 284 n.1, 96 S.Ct. 2036, 2038 n.1, 48 L.Ed.2d 636, 639 n.1 (1976); *District of Columbia v. Carter*, 409 U.S. 418, 432–33, 93 S.Ct. 602, 610, 34 L.Ed.2d 613, 624 (1973). *See also City of Kenosha v. Bruno*, 412 U.S. 507, 514, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109, 116 (1973).

To decide whether to imply a cause of action for money damages from the fifth amendment Due Process Clause, we must examine *Bivens* itself. While *Bivens* is not without ambiguity, the analysis employed by the Court shows that the cause of action created is not wholly of constitutional dimensions. The opinion of the Court expressly states:

> we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

403 U.S. at 397, 91 S.Ct. at 2005, 29 L.Ed.2d at 627. The cases relied upon for guidance by the Court in *Bivens* dealt with implying a cause of action from federal statutes that created rights but provided no federal remedy.[6] Moreover, in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court's most comprehensive treatment of implied statutory causes of action, the Court relied upon *Bivens* to support two points of its four-part statutory analysis.[7]

If the fourth amendment had mandated a cause of action for monetary damages, *Bivens* would have had no occasion to consult or discuss the action or inaction of Congress. Since the Court explicitly reasoned its precedent on the latter ground, we take the *Bivens* remedy to be one implied as a matter of federal common law[8] and therefore subject, like

6. *See* 403 U.S. at 396–97, 91 S.Ct. at 2005, 29 L.Ed.2d at 626–27, *citing J. I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423, 428 (1964) (federal securities laws); *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (action for abuse of process through misuse of statute governing Congress' subpoena power); *United States v. Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954) (indemnity action by government under Federal Tort Claims Act); *United States v. Standard Oil Co.*, 332 U.S. 301, 311, 67 S.Ct. 1604, 1609–10, 91 L.Ed. 2067, 2073 (1947) (government sought implied remedy, based upon established common law action).

7. *Bivens* is cited in *Cort* to support the proposition that causes of action for damages should not be implied to govern matters "traditionally relegated to state law, in an area basically the concern of the States," 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36, and the proposition that where such actions have been implied, "there has generally been a clearly articulated federal right in the plaintiff," *id.* at 82, 95 S.Ct. at 2090, 45 L.Ed.2d at 39.

8. *See Kostka v. Hogg*, 560 F.2d 37, 44 & n.7 (1st Cir. 1977). *See also Rodriguez v. Ritchey*, 556 F.2d 1185, 1193–94 (5th Cir. 1977) (en banc). *See generally Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 937 & n.14 (9th Cir. 1977); C. Wright, *Federal Courts* § 60 (3d ed. 1976), *citing D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 465–75, 62 S.Ct. 676, 683–88, 86 L.Ed. 956, 966, 971 (1942) (Jackson, J., concurring):

> Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law

315 U.S. at 472, 62 S.Ct. at 686, 86 L.Ed. at 969; Monaghan, Foreword: Constitutional Common Law, 89 Harv.L.Rev. 1, 10–13, 22–26 (1975).

Where a remedy is of constitutional dimensions and particular elements are not subject to revisions by Congressional legislation, the Court has clearly so indicated. *See, e. g., Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1923).

all such law, to the power of Congress to alter or withdraw. Therefore, we employ a two-step analysis. First, we look to the jurisprudence of statutory implication to determine whether to imply a damage action of non-constitutional dimensions. Second, if this initial inquiry does not suggest that such an action should be implied, we must determine whether the Constitution nevertheless compels the existence of a remedy in damages to vindicate the rights asserted. *See Kostka v. Hogg*, 560 F.2d 37, 42 (1st Cir. 1977). Applying this analysis to Davis' claim, we find that the district court properly concluded that no cause of action existed.

[1] Courts have considered several factors in determining whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appropriate for federal law. *Cort v. Ash*, 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36 (1975). Of course, the factors examined in questions of implied statutory causes of action, as set forth in *Cort* and preceding cases, cannot be applied in precisely the same way where implying a *Bivens*-type action is at issue. However, this circuit has held that the *Cort* factors do not set forth a rigid pattern of analysis that a court must follow precisely. Rather, "the Court simply said that several factors were relevant and worthy of consideration." *Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

Where federal courts have inferred a federal private cause of action not expressly provided, there generally has been a clearly articulated federal right in the plaintiff. *Cort v. Ash*, 422 U.S. 66, 82, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26, 38 (1975), *citing Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394–95, 91 S.Ct. 1999, 2003–04, 29 L.Ed.2d 619, 625–26 (1971). While the fifth amendment right to due process certainly confers a right upon Davis, the injury alleged here does not infringe this right as directly as the injury inflicted in the unreasonable search of Webster Bivens offended the fourth amendment. The concept of due process encompasses virtually all of the civil liberties derived from the Constitution. While the fifth amendment Due Process Clause surely exists for the "especial benefit" of Davis, as *Cort* required, it does not exist with equal certainty to protect her tenure in a non-competitive personal aide position statutorily denominated as service at will. 2 U.S.C.A. § 92.

Cort looked to "legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36. *Bivens* recognized that congressional intent to create a remedy must guide a court in determining whether to imply a remedy from provisions of the Constitution. 403 U.S. at 396–97, 91 S.Ct. at 2004–05, 29 L.Ed.2d at 626–27. Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position. In Section 701, Title VII of the Civil Rights Act of 1964, Congress excluded the federal government from the general definition of "employer," thus denying federal employees a statutory damage action under Title VII. 42 U.S.C.A. § 2000e(b). In 1972, Congress amended Title VII to add Section 717, which provided a separate administrative remedy for discrimination in federal employment, but did not extend the remedy to employees of Congress not in the competitive service. Under Section 717, other federal employees may have review in the federal courts of final action by their employing agencies or the Civil Service Board of Review. 42 U.S.C.A. § 2000e–16(a) (1974). Congressional action in designing Title VII remedies shows Congress adhered to the legislative judgment expressed in the statute under which Davis was hired: Members of a congressman's personal staff are removable by him "at any time . . . with or without cause." 2 U.S.C.A. § 92.

Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect. When Congress enacted Section 717, it believed that no other effective remedy existed for federal employees treated discriminatorily. *See Brown v. General Services Admin.*, 425 U.S. 820, 826–28, 96 S.Ct. 1961, 1965–66, 48 L.Ed.2d 402, 407–08 (1976); H.R.Rep.No. 92-238, 92d Cong. 2d Sess., [1972] U.S. Code Cong. & Admin.News, pp. 2137, 2160. However, in amending Title VII to make it the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination" for those federal employees it covered,[9] Congress did not grant federal employees in the competitive service an action for damages against their superiors in their individual capacities.[10] The Supreme Court has upheld the exclusivity of Title VII as a remedy for federal employment discrimination against employees in the competitive service whom it covers. In *Brown*, the Court held that Congress could require federal employees alleging discrimination to seek relief solely within the confines of Title VII, a limitation which plaintiffs could not surmount by the simple expedient of putting a different label on the pleadings. 425 U.S. at 832, 96 S.Ct. at 1968, 48 L.Ed.2d at 411. Congress cannot have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection.

Cort calls for an examination of the consistency of a statutory cause of action with the statutory scheme enacted by Congress. 422 U.S. at 78, 84, 95 S.Ct. at 2088, 2090–91, 45 L.Ed.2d at 39. The Court in *Bivens* made an analogous inquiry in considering the particular difficulties presented in enforcing the guarantees of the fourth amendment. The fourth amendment has presented the Court with a series of remedial dilemmas, not encountered in other contexts, with which the Court has wrestled actively for over half a century. The amendment's subject matter is such that law enforcement officials, who necessarily make the searches and seizures it governs, are themselves the group most like-

9. 425 U.S. at 828, 96 S.Ct. at 1966, 48 L.Ed.2d at 408.

10. Section 717, 42 U.S.C.A. § 2000e-16(c) (1974), allows an employee or applicant aggrieved by final action or a failure to take final action on his administrative complaint to file a civil action under Section 706, 42 U.S.C.A. § 2000e-5 (1974), in which "the head of the department, agency, or unit . . . shall be the defendant." However, under this section, federal defendants may be sued only in their official capacities, and not as individuals. *See Keeler v. Hills*, 408 F.Supp. 386, 387 (N.D.Ga. 1975); *see also Jones v. Brennan*, 401 F.Supp. 622, 627 (N.D.Ga.1975).

ly to be hostile to its barriers. This hostility of law enforcement officials to the restraint of the fourth amendment led the Court initially to adopt the exclusionary rule for federal cases, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and then to apply it to the states in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), when criminal actions and state law tort actions proffered as a substitute remedy in *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), showed themselves ineffective. However, the exclusionary rule—the remedy chosen to secure the right—also has proved less than satisfactory. *See Bivens v. Six Unknown Named Agents*, 403 U.S. at 411, 91 S.Ct. at 2012, 29 L.Ed.2d 635 (1971) (Burger, C. J., dissenting). Thus the Court continues to struggle for a just means for enforcing the fourth amendment. *See Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Violations of fourth amendment rights occur in a well-defined setting familiar to the courts. The relationship is always one between law enforcement officials and citizens suspected of possessing evidence of crime. The context in which these violations may arise is sufficiently limited to allow the court to determine that an action for damages would be consistent with the purpose of the fourth amendment in future instances in which such an action might be invoked. The fifth amendment Due Process Clause presents no similarly focused remedial issue. To the contrary, the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable and that there is simply no way a court can judge whether this remedy will be appropriate for securing the right in future situations where some plaintiff might assert it.

The final factor considered in *Cort* is whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 84–85, 95 S.Ct. at 2088, 2091, 45 L.Ed.2d at 36, *citing Bivens v. Six Unknown Named Agents*, 403 U.S. at 394–95, 91 S.Ct. at 2003–04, 29 L.Ed.2d at 625–26. Under this factor we consider the effect that implying a remedy would have upon both state law and the federal judiciary. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480, 494 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739–741, 95 S.Ct. 1917, 1927 28, 44 L.Ed.2d 539, 551–52 (1975). While the particular circumstances of the case at bar raise questions of federal rights in federal employment, adoption of the broad principle upon which the granting of relief to Davis hinges would expand federal jurisdiction into broad fields of law presently occupied by state court systems. Therefore, we properly consider this factor.

Adoption of Davis' interpretation of *Bivens* would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law because, by its nature, every tort deprives the victim of due process through unlawful appropriation of liberty or property or both. Indeed, logically, the expansive effect of such a holding would not end there. It also would extend federal jurisdiction to cover all state action tort claims, either under pendent jurisdiction, *cf. Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), or under a cause of action implied from the fourteenth amendment. The latter of

these state action claims would be cognizable without regard to diversity of citizenship, amount in controversy or other present statutory limitation. Because of the breadth of due process, a decision implying an action for money damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee. Thus, the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings looms far more ominously than in *Bivens*. 403 U.S. at 391 & n.4, 91 S.Ct. at 2002 & n.4, 29 L.Ed.2d at 623 & n.4.

Not only does this case fail to present special remedial difficulties analogous to those faced by the Court in dealing with the fourth amendment, but also Congress avoided creating an action for money damages for Congressional aides in non-competitive positions. Moreover, implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary and whose resolution is better suited to courts of general jurisdiction. These special considerations, not present in *Bivens*, eliminate any question of our creating a remedial right under our federal common law powers. This conclusion does not end our inquiry, however, for we still must determine whether the Constitution nevertheless compels an action for money damages implied from the fifth amendment Due Process Clause.

[2] Therefore, we next consider whether, in this case, a damage action is indispensible to the effectuation of the fifth amendment Due Process Clause and thus beyond the power of Congress to preclude. *Cf. Kostka v. Hogg*, 560 F.2d at 44. We conclude that the proposed damage remedy is not constitutionally compelled. Not every right that conceivably could be wedged within the literal breadth of due process demands federal protection through a cause of action for monetary damages. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court considered the reach of federal remedies where Congress, in 42 U.S.C.A. § 1983, expressly provided that violation of constitutional rights by one acting under color of state law would give rise to a cause of action for monetary damages. Even with an express statutory mandate to provide a federal damage action, the Court noted that "'the range of interests protected by procedural due process is not infinite.'" 424 U.S. at 709, 96 S.Ct. at 1164, 47 L.Ed.2d at 418 (1976), *citing Board of Regents v. Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). Here, we do not consider, as the Court did in *Paul*, what due process may encompass given an express statutory mandate to extend a cause of action for money damages to the full reach of the right. Rather, we consider the extent to which the Constitution requires that we countermand the clearly discernible will of Congress to create a cause of action where Congress declined to provide one. *Paul* thus teaches that we should restrain our reach far more than the Court did there.

Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief where the employer remained in office, although congressional employees in the non-competitive service whose allegedly discriminating employers are not in office may be left without a remedy for sex discrimination in employment unless Congress re-

verses its present statutory stand.[11] Other due process wrongs would either continue to be remedied in traditional ways through tort actions in courts of appropriate general jurisdiction or through special statutory remedies provided by state legislatures or Congress. Admittedly, some not now covered would remain inactionable.

Another provision of the Constitution must also be considered. Our rejection of the broad principle asserted by Davis is premised upon much more than just another "floodgates" argument. The prospect here is of so crushing an already precariously overloaded federal judicial system as to render meaningless the power the Constitution vests in Congress under Article III, Section 1, of the Constitution to establish the jurisdictional ambits of the inferior courts it has created. We decline to hold that by implication the fifth amendment requires such an anomalous result.

[3] Given these consequences and our inability to construct a plausible measure for acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged, we refuse to take even a first step down the slippery slope until the Supreme Court answers the open question of whether any such right should exist. Because no right of action may be implied from the Due Process Clause of the fifth amendment, the district court correctly ruled that no civil action for damages may be maintained here. Absent such a right of civil action, the district court cannot exercise jurisdiction under 28 U.S.C.A. § 1331(a), which confers jurisdiction only for "civil actions wherein the matter in controversy . . . arises under the Constitution . . . of the United States." To the extent that *Weir* is inconsistent with this position, it is overruled. Our affirmance on the jurisdictional ground means we do not reach Davis' second contention. Therefore, we vacate the district court's decision on the ground that Passman's conduct in firing her did not violate the Constitution.

The judgment of the district court is AFFIRMED IN PART, AND IN PART VACATED.

JONES, Circuit Judge, specially concurring:

If there is a constitutional barrier against the exercise of the judicial power to decide the controversy between Mrs. Davis and Mr. Passman then, so I believe, that bar should be raised rather than denying relief because the Congress has failed to enact legislation providing a remedy.

I do not believe that the constitutional provisions here pertinent are to be confined to the Speech and Debate clause.[1] The broader provision by which all legislative powers are vested in the Congress[2] is relevant to this cause. It might be said that the doctrine of inclusio unius est exclusio alterious permits or requires a construction that a Congressman may be judicially questioned for any and all else that a Congressman might do in the exercise of the legislative power except in speech or debate. Obviously the Constitution has no such

11. Davis has not challenged the distinction in Title VII between federal employees in competitive positions and those in non-competitive positions for the purposes of Title VII remedies.

1. The Senators and Representatives . . . for any speech or debate in either House . . . shall not be questioned in any other place. U.S.Const. Art. I, § 6(1).

2. U.S.Const. Art. I, § 1.

meaning. We may remind ourselves of Chief Justice Marshall's reminder as to constitutional construction.[3]

In no small measure the genius of the Founding Fathers in framing that most wonderful work ever struck off by man[4] is the separation of powers among the three branches of government. Although the need for checks and balances requires that no one of the departments shall be wholly unrelated to each of the others[5] the essential functions of each are, by the terms of the instrument, separate from those of the others.[6]

Notwithstanding the Gravel[7] and Brewster[8] cases and Senator Ervin's critical comments upon them[9] the doctrine of separation of powers survives.

It is not necessary to say that all of the activities of the members of a Congressman's staff are legislative. It will not be said that they are not so in large measure. Their activities are as many and as varied as those of the members served by them. It has been well stated that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . ." *Gravel v. United States*, supra, 408 U.S. at 616–17, 92 S.Ct. at 2623.

It seems to me the court held that judicial relief is denied because the Congress has failed to provide a judicial remedy. Rather I think the court should say that the hiring and firing of his "alter ego" is a legislative activity and a part of the exercise of the legislative power. The question is not one of whether there is a judicial remedy. The question, as I see it, is whether or not the controversy is one involving the exercise of the legislative power and within the jurisdiction of the Congress. Let it decide whether there should be absolute immunity. Let it determine whether there is a right and if so to fashion a remedy and designate a tribunal to declare and enforce it. I think it should have been held that the complaint does not state a claim upon which relief can be granted.

RONEY, Circuit Judge, concurring:

I concur in the result reached by the majority opinion, but I am constrained to articulate the difference I see between this case, in which I agree that plaintiff has no constitutional damage remedy based on an alleged fifth amendment violation, and the case of *Rodriquez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (*en banc*), in which I joined a dissent on the ground that plaintiff there could claim damages against federal officers for an alleged due process violation.

3. "We must never forget that it is a constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

4. William E. Gladstone, 127 North American Review 179 (Sept.—Oct.1878).

5. J. Madison, The Federalist, No. XLVIII (1852 ed.).

6. It may be appropriate to take note of a recent comment of the Attorney General that although the Constitution and statutes provide that the President shall nominate and by and with the advice and consent of the Senate shall appoint federal judges and U.S. attorneys the reality is that "the Senate nominates and the President confirms persons to fill those offices." Griffin B. Bell, Washington Post, February 27, 1978.

7. *United States v. Gravel*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

8. *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

9. Sam J. Ervin, Jr., The Gravel and Brewster cases: An Assault on Congressional Independence, 59 Va.L.Rev. 175 (1973).

In his concurring opinion in *Bivens*, Justice Harlan intimated that "the appropriateness of money damages may well vary with the nature of the personal interest asserted." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 n.9, 91 S.Ct. 1999, 2011, 29 L.Ed.2d 619, 634 (1971) (Harlan, J., concurring). The distinction I find between *Rodriguez* and the instant case lies in the nature of the personal interest asserted in the "due process" violations alleged. In *Rodriguez* the plaintiff was indicted, arrested, and held in bail for many months for a crime she knew nothing about and of which she was altogether innocent, because of the allegedly unconstitutional acts and conduct of a federal agent. In dissent, both Judges Coleman and Goldberg, with whom I concurred, held that plaintiff had a *Bivens*-type damage claim if the agent's acts were so reckless as to constitute a willful violation of the plaintiff's "right to remain free of unconstitutional intrusions by governmental agents." 556 F.2d at 1195.

To me, there is little distinction between the personal liberty invasion by arrest and indictment in *Rodriguez* and the personal liberty invasion by the private apartment search, seizure, and arrest in *Bivens*. Both cases involved the citizen's right to be let alone by Government agents, unless the agents act within the governmental powers ordained by the Constitution. The Constitution gave limited power to the Government it created. Without a constitutional base, no individual has the legal authority to act against another individual in the name of Government. Some governmental powers are specifically given, but to make absolutely sure that certain powers not given would not be read into the Constitution by overzealous Government officers, either executive, congressional, or judicial, there is a list of "shall nots" in the Bill of Rights. Many of the individual rights enumerated there were neither "created" nor "given" by the Constitution, but rather were recognized as being inherent rights of individuals long before the summer of 1787. The framers' approach to those rights in the written Constitution was to try to assure they would remain forever free of governmental intrusion.

Such were the fundamental rights at stake in *Bivens* and *Rodriguez*. Even before the drafting of our Bill of Rights, plaintiffs Bivens and Rodriguez had an inherent right to be free from the type of intrusions they suffered. The constitutional amendments—in *Bivens*, the fourth, and in *Rodriguez*, the fifth—merely protected those rights by specific prohibition against encroachment. I saw *Rodriguez* as being controlled by *Bivens* and would have there held that the case law provided plaintiff Rodriguez with a damage remedy, a damage remedy rooted in preconstitutional notions of tort law.

In this case, however, no similar right is at stake. The defendant has not intruded upon a liberty interest with preconstitutional origins. Historically, employers had an inherent right to hire and fire whom they pleased, for whatever reason, arbitrarily, with no need to account to anyone for their actions, except perhaps to their conscience and their God, and for governmental employers, to their voters. This understanding of the employer-employee relationship prevailed when the Constitution was drafted and, indeed, formed the basis for decisions of the United States Supreme Court in this century. *See Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908); *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915). Under this early theory, Ms. Davis had no right to be hired in the first place, and if hired, held her job subject to the whim of the individual who had the power to hire and fire.

But the Constitution has allegedly given her a right not to be fired on the basis of her sex. This right is not, however, a protected inherent right, but a right "created" by the Constitution, a right which in fact encroaches upon what was historically viewed as an inherent right of her employer.

Now the question is, Where does one find the roots for a damage remedy for a violation of this right so recently discovered in the recesses of the fifth amendment?

The dissenting opinion of Judge Goldberg repeatedly invokes the oft-quoted dictum that "where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939, 944 (1946), *quoted in Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). It is interesting to note, however, that the author of that statement, Justice Black, dissented in *Bivens* on the ground that "neither Congress nor the State of New York [had] enacted legislation creating . . . a right of action [for damages]." 403 U.S. at 428, 91 S.Ct. at 2020. (Black, J., dissenting).

The people, by both Constitution and statute, can and often do create rights for which they provide either no remedy or a restricted remedy for the violation thereof. In analyzing such rights, the courts are not entirely free to afford remedies which have not been provided by the creator of the rights. Thus, to me, Judge Clark makes a necessary analysis to determine whether a damage remedy is rooted in the document which created the violated right. Here we find the relevance of the analysis provided in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). To me also, this is where I part from Judge Goldberg, with whom I joined in *Rodriguez*.

The majority opinion does not "cut back" on *Bivens*. The underlying facts and concept of *Bivens*, by themselves, simply do not cover the rights asserted in this case. The question, then, is not whether *Bivens* applies, but whether the courts will infer from the Constitution itself a damage remedy for the violation of the kind of due process right here claimed. For here, a damage remedy must be rooted in the document—the Constitution—which created the violated right, or a subsequent statute, since there is no preconstitutional source for it.

This gets down to the real difference between the majority and the dissent, in my view. *Bivens* can easily be grounded on the premise that courts may remedy the unlawful violation of constitutionally "protected" individual rights. But it will better satisfy the revered concept of Government "by the people" if the rights "created" by Constitution or statute are remedied in only those ways that can safely be inferred from the creating documents.

Bivens, which produced five separate opinions, was not an easy decision. Lower courts probably disserve the law by carrying obviously difficult, narrow, limited decisions of the Supreme Court far beyond their intended reach. Such judicial activity subverts a major objective of law in an organized society: to provide certainty for human action. The

majority of this Court has shown precisely the restraint required. If the people, through their elected officials, choose to provide the remedy sought here, so be it; but until then the courts, through their appointed judges, should not require it.

It is impossible to completely align the cases in such a way as to support the distinction made here between *Bivens* and *Rodriguez*, and this case. But so is it impossible to line up the cases to support any other logical *Bivens* premise. There is a bit of symmetry, however, if we look only at the facts of the cases, and the results, and disregard the verbalization of principles in the written opinions. In the purest sense, the facts and the result are the precedent from which *stare decisis* should flow anyway.

As the Supreme Court held in *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 90 L.Ed. 939 (1946) federal question jurisdiction, as opposed to a federally recognized right of relief, is created by the mere allegation of matters in controversy arising under the Constitution or laws of the United States. Most of the circuit court cases dealing with *Bivens*-type claims in constitutional areas other than the fourth amendment have decided only the federal jurisdiction question. Dicta aside, these cases have merely found allegations of constitutional violations to be sufficiently substantial to ground federal jurisdiction under 28 U.S.C.A § 1331. This is altogether different from inferring a *Bivens*-type damage remedy from the constitutional provisions asserted. *See, e. g., Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976); *Lewis v. District of Columbia Dept. of Corrections*, 174 U.S.App.D.C. 483, 533 F.2d 710 (1976).

Indeed, the only cases cited by the dissent as extending *Bivens* beyond the fourth amendment to the due process rights of discharged employees were not *Bivens* remedy cases. In *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977) the Second Circuit held that a claimed denial of due process by a discharged elementary school teacher stated a cause of action arising directly under the fourteenth amendment. On the question of remedies, however, the court stated: "Whether money damages are available under this cause of action or only equitable relief . . . is a question of remedies that we need not reach . . . ." *Id.* at 197 n.4 (citation omitted). Since the power of federal courts to grant equitable relief for violations of constitutional rights was recognized prior to *Bivens*, the *Gentile* court did not really advance the march of *Bivens* into the area of fifth amendment rights. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 400, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring); *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Likewise, in *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977) the Eighth Circuit held that a discharged city employee was entitled to monetary relief in the nature of backpay for violation of fourteenth amendment due process, but was careful to emphasize that it was discussing "only an equitable remedy . . . ." *Id.* at 933 n.9 and 940.

Cases in which circuit courts have inferred a *Bivens*-type damage remedy from constitutional amendments other than the fourth have varied widely in their facts, but have generally involved an intrusion into a liberty interest having preconstitutional origins. For example, the first amendment did not "create" the right to express one's views free from unlawful governmental intrusion; it merely protected an already present right from governmental interference.

Dellums v. Powell, 566 F.2d 167 (D.C. Cir.1977) (speakers and demonstrators unlawfully arrested by District of Columbia police during 1971 "May Day" demonstration have cause of action for damages arising directly under first amendment);

Paton v. LaPrade, 524 F.2d 863 [862] (3rd Cir. 1975) (Bivens-type damage remedy for violation of first amendment rights available to 16-year-old school student who was investigated by FBI after sending off for literature from Socialist Workers Party in connection with her social studies class); *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975) (complaint alleging that because of antifluoridation speeches made by plaintiff, Department of Health, Education and Welfare coerced plaintiff's employer to fire him stated a *Bivens*-type damages action for violation of first amendment rights).

Nor did the due process clause of the fifth amendment "create" a right in the individual to be free from deprivation of liberty and property interests; it merely provided that government encroachment would be constitutional only if it followed the criteria therein provided.

Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977) (allegation that certain zoning ordinances enacted by agency operating under federal law effectuated a "taking" of plaintiff's land states a *Bivens*-type damage claim arising directly under the fifth amendment);

State[s] Marine Lines, Inc. v. Schultz, [Shultz] 498 F.2d 1146 (4th Cir. 1974) (unlawful seizure of plaintiff's property by Customs agents gives rise to a *Bivens*-type damage action arising directly under fifth amendment);

United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3rd Cir. 1972) (allegations that FBI agents falsified documents and testified falsely in order to convict plaintiff state cause of action for damages arising directly under fifth amendment).

These fundamental rights, unlike the liberty interest asserted by Ms. Davis, are not "created" by the Constitution but are inherent in the individual, either absolutely "protected" by the framers from encroachment by the Government, or "protected" to the extent provided in the Constitution.

In sum, a claim for damages should not be foreclosed merely because it arises out of a fifth amendment violation, rather than a fourth, but should be considered on the basis of the personal interest asserted. The remedy sought for the personal interest asserted by Ms. Davis cannot be infused into the Constitution without unduly burdening the reasoning with the hope, faith, and personal preference of the reasoner. Therefore, I would affirm the district court.

GOLDBERG, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, joins, dissenting:

A majority of the en banc court today holds that no private cause of action for damages may be implied from the due process clause of the fifth amendment to the United States Constitution. I believe that this conclusion, certainly as it applies to the facts of this case, is untenable so long as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), is good law. Finding nothing in subsequent opinions of the Supreme Court which undercuts the vitality of the reasoning in *Bivens*, I would hold that Shirley Davis has a private

right of action for damages to vindicate her constitutional rights. While recognizing that constitutional attrition may be the benchmark of the 1970's, I would leave it for the Supreme Court to place the mark of Cain on *Bivens'* heretofore unblemished brow. It is a source of deep regret that it is the Fifth Circuit, a court so often exemplary in its affirmation of constitutional rights, which has chosen to start *Bivens* down the slippery slope into desuetude and demise. I respectfully dissent.

I.

In the early part of 1974 Shirley Davis was Deputy Administrative Assistant to Congressman Otto E. Passman of Louisiana's Fifth Congressional District. The Representative terminated Ms. Davis's employment, effective July 31, 1974. In his letter to her explaining the termination decision the Representative wrote, "You are able, energetic and a very hard worker. . . . [H]owever, on account of the unusually heavy workload in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant be a man." The full text of this rather remarkable letter is set out below.[1]

Davis then filed this action against the Representative, claiming he had violated the equal protection component of the fifth amendment's due process clause. She invoked the court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331(a) and sought relief including, *inter alia*, damages from Passman in his individual capacity. The district court assumed jurisdiction of the case and proceeded to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), holding that "the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution" and that "the law affords no private right of action to plaintiff therefor." A panel of this court reversed the decision of the district court and remanded the case for trial. 544 F.2d 865 (5th Cir. 1977). The panel concluded that taking the complaint's allegations as true, Representative Passman's dismissal of a staff member on the basis of gender violated the equal protection component of the fifth amendment due process clause; that under *Bivens* the Constitution itself affords the dismissed staff member a damages remedy; that sovereign immunity does not bar a damages award against the Representative individually; that the speech or debate clause does not extend to staff dismissals because they are not "legislative tasks" within the Supreme Court's holdings; and that the existence of qualified immunity cannot support the district court's dismissal of the complaint. *See id.* at 882.

Circuit Judge Jones dissented from the judgment of the panel on the basis of the doctrine of separation of powers. *Id.* Representative Passman, by then defeated in his bid for reelection and retired from the Congress, filed a petition for rehearing en banc, alleging that congressional hiring and firing were insulated from judicial review under the political question doctrine and the speech or debate clause. The court granted rehearing en banc. Today, not reaching the thorny constitutional issues posed by the scope of congressional immunity under the speech or debate clause, the en banc majority determines that no right of action for damages may be implied from the fifth amendment due process clause. As I dissent from this holding, I necessarily must reach the other issues, including the applicability of the speech or debate clause, considered in the panel opinion. On those issues, I would adhere to the analysis explicated in the panel opinion; I confine my remarks here to the *Bivens* question. On *Bivens*, the thrusts of Judge Clark's opinion for the en banc majority merit defensive parries in response.

II.

Only in one case has the Supreme Court directly confronted and decided the question whether a federal cause of action for damages may be implied directly from the United States Constitution: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[2] Having created in that case "a policy of access,"[3] the Court has since chosen to refrain from possibly premature rigidification of the contours of the *Bivens* action,[4] in effect licensing the

1. Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,
/s/ Otto E. Passman
Member of Congress

2. Also worthy of mention is *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933) (founding right to recover just compensation directly on the fifth amendment; statutory recognition not necessary). Of course, it is clear "that there is an implied injunctive remedy for threatened or continuing constitutional violations." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 723 (2nd Cir. 1969), *rev'd on other grounds*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), citing *Bell v. Hood*, 327 U.S. 678, 684 and n. 4, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 696-97, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). *See also Bivens, supra*, 403 U.S. at 400, 404, 91 S.Ct. at 2006, 2008, 29 L.Ed.2d at 628 (Harlan, J. concurring).

3. Lehmann, "*Bivens* and its Progeny," 4 Hastings Const.L.Q. 531, 539 (1977).

4. *See* cases cited in majority opinion, *supra*, at n. 5.

lower federal courts to develop their own rules setting the parameters,[5] consistent with the mandate of *Bivens* itself, within which constitutional rights may be vindicated by private damage actions. As noted by the en banc majority, few courts have held that *Bivens* actions are limited to fourth amendment claims.[6]

5. *See* Lehmann, *supra* n. 3, at 540, 604.

6. *See* majority opinion, *supra*, at p. ——, slip op. at p. 3508. Apart from decisions in several circuits declining to imply causes of action against municipalities directly under the fourteenth amendment, in view of the exemption of municipalities from liability under 42 U.S.C. § 1983, *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977), *McDonald v. State of Illinois*, 557 F.2d 596, 604-05 (7th Cir.), *cert. denied*, — U.S. —, 98 S.Ct. 508, 54 L.Ed.2d 453 (1977); *cf. Mahone v. Waddle*, 564 F.2d 1018, 1022-25 (3rd Cir. 1977) (declining to imply a constitutional cause of action but finding an effective federal statutory remedy under § 1981), there appear to be no other decisions at the Court of Appeals level rejecting the availability of *Bivens* causes of actions under other constitutional amendments. Circuits founding causes of action directly on constitutional provisions other than the fourth amendment, or finding claims sufficiently substantial to ground jurisdiction on 28 U.S.C. § 1331, include the

D.C. Circuit: *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C.Cir.1977) (first amendment, cause of action); *Payne v. Government of District of Columbia*, 559 F.2d 809, 818-19 (D.C. Cir.1977) (fifth amendment, jurisdiction; favorable dicta on cause of action); *Lewis v. District of Columbia Department of Corrections*, 174 U.S.App.D.C. 483, 533 F.2d 710 (1976) (fifth amendment, jurisdiction); *accord, Greenya v. George Washington University*, 167 U.S.App.D.C. 379, 385, 512 F.2d 556, 562 n. 13, *cert. denied*, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975); *Upton v. Wilson*, 165 U.S. App.D.C. 22, 35, 506 F.2d 83, 96 (1974); *Carbnale v. Washington Technical Institute*, 163 U.S.App.D.C. 123, 128, 500 F.2d 791, 796 n. 5 (1974); *Sullivan v. Murphy*, 156 U.S.App.D.C. 28, 55, 478 F.2d 938, 965 and n. 47, *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973) (fourth and fifth amendments, jurisdiction; favorable dicta on remedy).

Second Circuit: *Gentile v. Wilson*, 562 F.2d 193, 196-97 (2nd Cir. 1977) (fourteenth amendment due process, cause of action); *accord, Brault v. Town of Milton*, 527 F.2d 730, 734-35 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975).

Third Circuit: *Paton v. La Prade*, 524 F.2d 862, 869-70 (3rd Cir. 1975) (first amendment, cause of action); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972) (fifth amendment, cause of action); *Gaghardi v. Flint*, 564 F.2d 112, 114-16 (3rd Cir. 1977) (fourteenth amendment, jurisdiction; reserving question of cause of action); *id.* at 117 (Gibbons, J. concurring) (cause of action). *But see Mahone v. Waddle, supra.*

Fourth Circuit: *States Marine Line, Inc. v. Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment, cause of action); *cf. Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments, suggesting jurisdiction).

Fifth Circuit: *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under eighth amendment and/or fourteenth amendment due process, jurisdiction); *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976) (fifth amendment, jurisdiction); *see also Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n. 1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801-02 and n. 2 (5th Cir. 1974); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1157 n. 2 (5th Cir. 1974). *But see Rodriguez v. Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc) (declining to speak on *Bivens* issue).

Sixth Circuit: *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975) (first amendment, cause of action, reasoning based on fifth amendment cases).

Seventh Circuit: *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 718-719 n. 7 (7th Cir. 1975), *cert. denied*, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976) (fourteenth amendment, suggesting availability of cause of action but denying relief); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976) (fourteenth amendment procedural due process, jurisdiction; favorable dicta); *cf. Cannon v. University of Chicago*, 559 F.2d 1063, 1082 (7th Cir. 1977) (dicta on availability of relief for violations of fundamental constitutional rights). *But see McDonald v. State of Illinois, supra.*

With respect to the due process clauses of the fifth and fourteenth amendments, the overwhelming weight of authority, particularly at the Court of Appeals level, holds that constitutional rights may be vindicated through implied causes of action for money damages.[7] And as the en banc majority is also aware, numerous panels of this circuit have adhered to *Bivens'* policy of access, finding jurisdiction under 28 U.S.C. § 1331 for district courts to entertain implied causes of action for damages under the due process clauses of the fifth and fourteenth amendments.[8] Nevertheless, taking Ms. Davis' allegations as true, the en banc court today chooses to deny a right of action to the victim of as blatant a case of gender-based discrimination as is within my experience on this court.[9]

Eighth Circuit: *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977) (fourteenth amendment due process, cause of action for monetary relief in the nature of backpay against a municipality); *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976) (finding no infringement of fair trial, privacy rights; assuming without deciding availability of *Bivens* cause of action); *Wounded Knee Legal Defense/Offense Committee v. F.B.I.*, 507 F.2d 1281, 1284 (8th Cir. 1974) (sixth amendment right to effective assistance of counsel, jurisdiction).

Ninth Circuit: *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 936, 941-42 (9th Cir. 1977) (separate causes of action available under fifth amendment due process clause and fifth amendment just compensation clause); *Bennett v. Campbell*, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of *Bivens* claims under fourth and fifth amendments; suggesting the availability of damage actions for deprivations "of constitutional rights"); *Mark v. Groff*, 521 F.2d 1376, 1378 and n. 1 (9th Cir. 1975) (fifth, sixth and eighth amendments, jurisdiction; reserving question of remedy); *cf. Gray v. Union County Intermediate Education District*, 520 F.2d 803, 805 (9th Cir. 1975) (finding no denial of rights; apparently assuming availability of cause of action for backpay and damages for violation of first amendment and due process rights).

Tenth Circuit: *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) (equal protection and due process, jurisdiction; favorable dicta on cause of action). *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976) (first, fourth, fifth, and ninth amendments; finding jurisdiction but denying relief on vicarious liability claim).

District court cases are collected in Lehmann, *supra* n. 3, at 566-68 and nn. 226-229.

Thus, seven circuits have implied causes of action directly from constitutional amendments other than the fourth. Of these, five circuits have implied causes of action from the due process clauses of the fifth and fourteenth amendments. In addition to these five, at least three circuits have found *Bivens* claims under the due process clauses sufficiently substantial to ground federal jurisdiction under 28 U.S.C. § 1331 and have commented favorably upon implication of damage actions from these clauses. Still another circuit, in implying a cause of action under the first amendment, has relied on cases implying causes of action from the fifth amendment. Today the Fifth Circuit becomes the first circuit to reject definitively the availability of a *Bivens* cause of action in any context other than a fourteenth amendment action against a municipality.

7. See cases cited in majority opinion, *supra*, at n. 4, and note 6 *supra*.

8. *See* majority opinion, *supra*, at p. ——, slip op. at p. 3509, and cases cited therein.

9. Gender-based discrimination may violate the due process clause of the fifth amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975), *quoting Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964). *See also Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Wiesenfeld, supra* (citations omitted).

Would that the Fifth Circuit had instead chosen to add one more jewel to its liberating diadem of pioneering jurisprudence. Still, the en banc court is correct in noting that despite the overwhelming weight of authority, choice is not foreclosed. The Supreme Court has invited judicial creativity, and Judge Clark, with his customary care and acuity, has authored as persuasive a rebuttal of this authority as might be imagined. Yet I remain unpersuaded. The test is *Bivens*. I offer here a reading of that case which I believe to be more consistent with its holding and more harmonious with its spirit than the reading offered by the majority.

III.

If I understand the majority's treatment of *Bivens*, the crux of its reasoning is that the Supreme Court was able to imply a damages remedy for violation of the fourth amendment by federal officers only because Congress had not spoken. The Supreme Court's indication of a possible willingness to accord some deference to an "explicit congressional declaration" of preference for an alternative remedy "equally effective in the view of Congress," *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005, is apparently taken to mean that a cause of action for damages is not "part and parcel of the underlying constitutional right," therefore "is not wholly of constitutional dimensions," and thus is "subject to the will of the Congress for the substitution of other remedies, *so long as the minimum demands of the Constitution are met.*" (Emphasis added). Majority opinion, *supra*, at pp. ——, slip op. at pp. 3510 3511.

What follows from this perspective is that the implication of a cause of action from the Constitution is initially to be governed, or at least guided, by the standards applicable to implication of remedies from statutory enactments, as elucidated by the Supreme Court in *Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Only if a cause of action for damages satisfies these statutory standards, or if* "a damage action *is* indispensible *to the effectuation of the fifth amendment,*" *(emphasis added), majority opinion,* supra *at p. ——, slip op. at p. 3514, may a damage remedy be implied.*

I believe that proper application of the *Cort* analysis to a constitutional claim would justify implication of a damages remedy directly from the fifth amendment on the facts of this case. But my disagreement with the majority is a more fundamental one: I believe the premises underlying the analytic structure proposed by the majority are irreconcilable with the Supreme Court's opinion in *Bivens*.

In my view *Bivens* is a decision of constitutional magnitude. The fundamental inquiry in *Bivens* was whether the Constitution mandates *some* remedy for a petitioner whose constitutional rights have been violated. Only after finding that *some* remedy is constitutionally compelled did the Supreme Court go on to consider which remedy is *appropriate*--not necessary in itself --in the circumstances of a given case to redress the constitutional violation:

> [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by

> virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

403 U.S. at 392, 91 S.Ct. at 2002, citing, *inter alia, Bell v. Hood,* 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). The Constitution creates a right in the plaintiff; the courts are to adjust their remedies to accord relief.

That the fourth amendment might be enforced by other plaintiffs, in other contexts, through mechanisms other than a damage action, was passed over by the *Bivens* majority as of little moment. What was significant to the Court was the remedial plight of the petitioner in the case before it. As stated by Justice Harlan, concurring:

> [I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. . . . [A]ssuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

Id. at 409-10, 91 S.Ct. at 2011-12. On the need to provide an effective remedy, the Court was unequivocal:

> [I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done.

Id. at 396, 91 S.Ct. at 2004, citing *Bell v. Hood,* 327 U.S. at 684, 66 S.Ct. at 777. In this respect, provision of a damage remedy "should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395, 91 S.Ct. at 2004 (citations omitted).

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his [constitutional] rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

Id. at 397, 91 S.Ct. at 2005 (citations omitted). Responding to the suggestion that a more stringent test should govern the grant of damages in constitutional cases, Justice Harlan stated:

> These arguments . . . seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.

Id. at 407, 91 S.Ct. at 2010 (concurring opinion) (footnote omitted).

The en banc majority's apparent conclusion that the *Bivens* damage action is of non-constitutional dimensions seems to be tied to its assumption[10] that a cause of action not "part and parcel of the underlying constitutional right" is merely federal common law of less than constitutional dimensions. But to state that the Court may accord some deference to a congressional choice of remedy "equally effective in the view of Con-

10. This assumption is speculative on the basis of *Bivens* itself. *See* Harlan, J., concurring:

> I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

Id. at 407 n. 7, 91 S.Ct. at 2010.

gress" is only to admit the possibility of *substitutes* for the damage remedy, not to say that Congress may eliminate all means of vindication of a federal constitutional right.[11] Had Congress chosen to provide a remedy alternative to money damages to those "in Davis' shoes," this court would be correct in according that choice deference, though even in those circumstances,

> [t]he ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review.[12]

Perhaps the clearest statement by the Supreme Court itself on this subject is found in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966):

> Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

Id. at 490-91, 86 S.Ct. at 1636.

The opinion of the en banc majority totally fails to address the core inquiry commanded by *Bivens*. Apart from a passing reference not applicable to the plight of Ms. Davis that "[a] plaintiff might still seek equitable relief where the employer remained in office," majority opinion, *supra*, at p. ——, slip op. at p. 3514, the en banc court nowhere considers whether *some* remedy must be available to vindicate fifth amendment rights. Where is the sensitivity that moved Justice Harlan to observe "For people in Bivens' shoes, it is damages or nothing"? 403 U.S. at 410, 91 S.Ct. at 2012. The majority essentially ignores the constitutional predicate for the *Bivens* decision, i. e., that there be a remedy, and reformulates the inquiry in a far more stringent fashion: a cause of action for damages will be implied only if damages, specifically, are in some absolute sense *necessary* to effectuate the constitutional mandate. The court then proceeds to find a damage remedy unnecessary while simultaneously acknowledging that constitutional deprivations of the sort suffered by Ms. Davis "would remain inactionable," and that Ms. Davis "may be left without a remedy for sex discrimination in employment" unless Congress chooses to create one. Majority opinion, *supra*, at p. ——, slip op. at p. 3514.

In short, the majority opinion errs because it answers the wrong question. If Congress had provided an alternative remedy and explicitly excluded a remedy in damages, the appropriate inquiry would indeed be whether a damage remedy as such is necessary, nevertheless, to effectuate the constitutional guarantee, and therefore constitutionally required. But where, as here, *no* alternative remedy has been made available, that inquiry is simply irrelevant. In leaving Ms. Davis without any remedy, the majority's approach seems to me an utter negation of *Bivens* in both letter and spirit.

A further result of the majority's analytic approach is that its opinion never comes to terms with the appropriateness of a remedy in damages as opposed to alternative remedial devices which the *court* might make available. The majority's unelaborated suggestion of "equitable relief" is oblivious to those constitutional values, critically implicated in this case, underlying the speech or debate clause and the doctrine of separation of powers. Congress has spoken specifically to its views on the nature of the working relationship between Congressmen and their personal staffs by classifying employees like Ms. Davis as removable "at any time . . . with or without cause." The Supreme Court has accorded congressional staffers speech or debate clause protections in certain circumstances, recognizing that staffers may act as congressional alter egos in the performance of certain legislative tasks. *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). *See Davis v. Passman*, 544 F.2d at 877-81 (panel opinion). Apparently the majority feels these values can be better effectuated, consistent with the requirements of the fifth amendment, not by actions for damages but by injunctive orders requiring Congressmen to employ particular individuals. This is not the occasion for a definitive statement on the circumstances which might justify implication of a private action for equitable relief to vindicate fifth amendment rights.[13] But on the facts of the case before us, I would have thought that such "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, 91 S.Ct. at 2005, are more germane to the implication of equitable relief than to implication of an action for damages.

Similarly, it would seem to me that the special problems of congressional immunity under the speech or debate clause and the doctrine of separation of powers render this case uniquely appropriate for adjudication in the federal courts under a federal cause of action. Much of the *Bivens* opinion concerns the difficulties and inadequacies of state court or state law adjudications of federal immunities in the context of constitutional claims; that reasoning is, if anything, even more powerful with respect to the issues presented here.

The majority's abiding fear seems to be "the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceed-

11. Professor Dellinger suggests that the passage in *Bivens* finding no "explicit congressional declaration" and rejecting "formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment," 403 U.S. at 397, 91 S.Ct. at 2005, might be read

> "affirmatively . . . to describe the conditions under which the Court should defer to congressional judgment even though a remedy may be substantively bound to constitutional provisions."

Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv.L.Rev. 1532, 1548 n. 89 (1972). Thus, where these conditions have not been met—where Congress has not provided an effective alternative remedy—there is no occasion for deference to congressional judgment. The courts must therefore "adjust their remedies so as to grant the necessary relief." 403 U.S. at 392, 91 S.Ct. at 2002, *quoting Bell v. Hood*.

12. *Dellinger*, *supra* n. 11. I find nothing in Professor Monaghan's provocative article, cited by the majority, inconsistent with this conclusion. Monaghan, "Foreward: Constitutional Common Law," 89 Harv.L.Rev. 1 (1975): "I think that *Bivens* is an explicit recognition that the constitutional guarantee embraces a right of action . . . which is enforceable by any appropriate remedy including damages . . . ." *Id.* at 24 n. 125. *See generally* Cox, "The Role of Congress in Constitutional Determinations," 40 Cincinnati L.Rev. 199, 247-261 (1971); Burt, "*Miranda* and Title II: A Morganatic Marriage," 1969 Sup.Ct.Rev. 81.

13. *See, e. g., Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 1965 and n. 7, 48 L.Ed.2d 402 (1976), and note 2 *supra*.

ings" [14] by "project[ing] the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law . . . ." and "extend[ing] federal jurisdiction to cover all state action tort claims . . . without regard to diversity of citizenship, amount in controversy or other present statutory limitation." Majority opinion, *supra*, at pp. ——————, slip op. at pp. 3514 3515. The majority refuses "to take even a first step down the slippery slope," "[g]iven these consequences and our inability to construct a plausible measure of acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged . . . ." *Id.* at p. ——, slip op. at p. 3515. A like contention was raised in *Bivens*. Justice Harlan had this response:

> [T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interest of stockholders defrauded by misleading proxies. See *J. I. Case Co. v. Borak*, *supra*. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 410-11, 91 S.Ct. at 2012 (concurring opinion). Even on the majority's own premises, I am considerably more confident in the ability of courts to discern, in a careful and focused manner attentive to the facts of the case before them, when the pendulum has swung too far and how its course may be corrected. I do not believe that the majority's approach to the facts of this case is such a focused inquiry; nor do I believe the pendulum has swung too far here. We have before us no illusory or fabricated procedural due process claim which raises the specter of wholesale importation of traditional state tort law actions into the federal courts, but a discrete claim of discrimination on the basis of gender in violation of the equal protection guarantees of the federal Constitution, in a context particularly appropriate to adjudication in a federal forum. This is precisely the sort of case mete for judicial determination and susceptible to the application of traditional judicial standards.

The majority's invocation of the twin horsemen of the contemporary judicial apocalypse, the floodgate and the slippery slope, and its refusal to act in the spirit of *Bivens* "until the Supreme Court answers the open question," majority opinion, *supra*, at p. ——, slip op. at p. 3515, seem to me not an example of judicial restraint but of judicial abdication. I would prefer the approach taken by the *Bivens* majority in its quotation of one of the fundaments of our constitutional jurisprudence:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,

14. The majority never indicates how Ms. Davis' claim might be "otherwise redressable in state courts or administrative proceedings."

403 U.S. at 397, 91 S.Ct. at 2005, *quoting Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 163, 2 L.Ed. 60 (1803), and by the Fourth Circuit in extending *Bivens* to fifth amendment due process claims:

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.

States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974).

I had not thought the fifth amendment was lodged behind an iron curtain, separating it from the rest of our constitutional protections. That the windows may open wide and the winds of freedom sweep through is no reason for rejecting the Davis claim. Are we to develop a calculus of constitutional access, granting rights to one out of seven persons deprived, one out of two, one out of a thousand, in order to control our docket? One wonders what would have happened had such constitutional parsimony pervaded our history. Hopefully the courthouse door, too often closed in recent years, will soon swing open again, and liberty shall ring forth once more from the halls of justice.

IV.

Much of the majority's discussion is devoted to an analysis of the *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) factors governing implication of causes of action from federal statutes. I have already indicated why this analysis seems somewhat beside the point given the constitutional mandate that *some* remedy be available to vindicate constitutional rights. Given that the court has adopted this approach, however, it is incumbent on me to respond to the majority's application of the *Cort* criteria.

I note initially that the majority makes no attempt in its *Cort* analysis to assess the relevance of the fact that Ms. Davis is seeking to vindicate a right granted by the Constitution itself, and thus beyond the ability of Congress to eliminate, rather than a statutory right of the sort Congress giveth and may take away. While recognizing that the *Cort* statutory analysis "cannot be applied [to the Constitution] in precisely the same way," the majority is content to proceed on the basis of a prior statement by this court (in a statutory case) that the *Cort* "factors [are] relevant and worthy of consideration." Majority opinion, *supra*, at p. ——, slip op. at p. 3511, *quoting Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

I think it is possible to do better. By recognizing the constitutional context within which it is here applied, the *Cort v. Ash* style of analysis may be turned to productive use in the sphere of constitutional common law. Properly applied, the *Cort* factors may serve to illuminate the choice of an appropriate remedial mechanism to vindicate constitutional rights. *Cort* thus guides the determination, not of *whether* to imply *any* remedy, but of *which* remedy it is appropriate to recognize. I believe that such a contextually sensitive application of the *Cort* criteria supports the panel decision in this case, and it is with this perspec-

tive that I turn to the majority's *Cort* analysis.[15]

In *Cort v. Ash*, the relevant portion of which concerns whether a corporate stockholder may secure derivative damage relief from corporate directors under 18 U.S.C. § 610 for corporate violations of the federal election campaign laws, the Supreme Court declined to imply a private cause of action for damages because

> implication of such a federal cause of action is not suggested by the legislative context of § 610 or required to accomplish Congress' purposes in enacting the statute.

422 U.S. at 69, 95 S.Ct. at 2084. The Court articulated four factors to guide its analysis in reaching this conclusion. The first factor has been central to all implication cases, from the first statutory implication decision in which it was originally formulated, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916), through to *Bivens* and more recent statutory cases: "is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?" 422 U.S. at 78, 95 S.Ct. at 2088, citing *Rigsby*, *supra*, 241 U.S. at 39, 36 S.Ct. 482. As the Supreme Court explained, "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff," citing *Bivens*, "or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard." 422 U.S. at 82, 95 S.Ct. at 2090 (citation omitted).

The en banc opinion in the instant case appears to acknowledge that "the fifth amendment right to due process certainly confers a right upon Davis." Majority opinion, *supra*, at p. ——, slip op. at p. 3511. There can be no suggestion that the fifth amendment's protection of Davis is "at best a subsidiary purpose" of the constitutional guarantee. *Cf. Cort*, *id.*, at 80, 95 S.Ct. at 2089. With respect to this first, and I think predominant, factor, that is all that *Cort* requires. Nor is more required by *Bivens*. That decision was explicit in the role of the fourth amendment:

> It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.

403 U.S. at 392, 91 S.Ct. at 2002.

I cannot understand why the equal protection component of the fifth amendment due process clause does not equally guarantee to all citizens of the United States, including Ms. Davis, the absolute right to be free from unconstitutional job discrimination on the basis of sex carried out by virtue of federal authority.[16]

15. I recognize that the majority's analysis proceeds from a different perspective. Were the fifth amendment simply a statutory enactment, there can be no doubt that a congressional determination to deny a private right of action for damages would be decisive under *Cort*. That conclusion, to the extent it embodies the majority's analytic approach, seems to me quite unshakeable but thoroughly irrelevant to this case.

16. It is frankly beyond my ken to understand first, the source of the majority's imputation of an additional hurdle of some degree of required specificity, or second, how the equal protection component of the fifth amendment is in this respect less specific than the fourth amendment. *See* majority opinion, *supra*, at p. ——, slip op. at p. 3511.

It is with respect to *Cort's* second factor, "legislative intent, explicit or implicit, either to create such a remedy or to deny one", 422 U.S. at 78, 95 S.Ct. at 2088, that my disagreement with the majority is at its sharpest. In *Cort*, as in other statutory implication cases, the underlying premise is that Congress may explicitly create or deny a private remedy; what Congress gives, it may take away. There is no underlying right which is constitutionally inviolate. In a statutory case, therefore, the implication question is whether congressional intent to create or deny a remedy is best effectuated by judicial implication of a cause of action. Correspondingly, the en banc majority seems to read *Bivens* as "recogniz[ing] that congressional intent to create a remedy must guide a court in determining *whether* to imply a remedy from provisions of the Constitution." (Emphasis added). Majority opinion, *supra*, at p. ——, slip op. at p. 3511. I find no such recognition in *Bivens* and believe this reading, as applied by the majority to deny Ms. Davis any remedial mechanism, is simply irreconcilable with *Bivens*. As pointed out in Section III of this dissent, the *Bivens* Court addresses the relevance of congressional action only *after* it has determined that some means of redress is constitutionally mandated; the voice of Congress is relevant, if at all, only in guiding the *court* in its determination as to whether damages provide an appropriate remedy. There is *no* suggestion in *Bivens* that Congress can negate the existence of *every* remedy which might vindicate a constitutional right, only an indication that the Court might accord some deference to an "explicit congressional declaration that persons injured by a federal officer's violation" of a constitutional right "may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." 403 U.S. at 397, 91 S.Ct. at 2005.

The en banc majority does not—and cannot—state that Congress has provided such an alternative remedy. Instead, the court tries to draw support for its position from the fact that "Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position." Majority opinion, *supra*, at p. ——, slip op. at p. 3511. Here the confusion between constitutional and statutory implication is most evident. Given the constitutional mandate for *some* effective remedy, the second *Cort* factor, legislative intent to deny any remedy, is simply irrelevant to this case. *See* Dellinger, *supra* n. 11, at 1548–49.

Much the same criticism can be levelled against the en banc majority's application of the third *Cort* criterion, consistency with the underlying purposes of the legislative scheme. The majority correctly notes that Congress, in providing statutory relief from employment discrimination under Title VII for employees in the private sector and in other spheres of government service, *see* majority opinion, *supra*, at pp. —— – ——, slip op. at pp. 3511–3512, has carefully avoided furnishing relief of any sort to many of its own employees. By providing an administrative—judicial mechanism for ensuring the rights of *covered* employees, Title VII may well constitute "an explicit congressional declaration" that covered employees "must be remitted to another remedy, equally effective in the view of Congress." Indeed, the Supreme Court has held that for federal employees covered by the complex and systematic remedial scheme of Title VII, that statute provides the exclusive judi-

cial remedy. *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).[17] Nothing similar can be said about congressional employees in the position of Ms. Davis, who are statutorily excluded from the coverage of Title VII. Congress has provided *no* remedial mechanism for them. Such employees are in no sense bound up in the statutory system of protections created by Congress, and I cannot perceive how according Davis a vehicle to enforce her constitutional rights would detract from or be inconsistent with the operation of the statutory scheme within the sphere of its application. I am also hard put to understand the en banc majority's suggestion that a constitutional cause of action would "deal more generously with those in Davis' position," majority opinion, *supra*, at p. ——, slip op. at p. 3512, than covered federal employees are dealt with under Title VII. It is true that if accorded a *Bivens* action, Davis could sue Representative Passman for damages in his individual capacity, while a Title VII plaintiff could not. But Title VII, for those to whom it applies, lowers the bar of sovereign immunity to permit a back pay award, together with possible equitable relief, directly against the United States. It also affords the possibility of relatively quick and inexpensive relief at the administrative level. This seems to me no less favorable than a possible recovery against a former congressman. It is unnecessary to speculate here on whether extension of Title VII to currently non-covered congressional employees would be the most appropriate mechanism for protection of constitutional rights or whether a remedial mechanism more carefully tailored to the particularities of congressional employment relationships would be preferable; I note only that Congress has done neither.[18] In these circumstances, the problem confronting us is precisely analogous to that before the *Bivens* court, and the response should be the same, to make available "a particular remedial mecha-

17. In *Brown*, the Court did not reach the constitutional issue of whether, absent the applicability of Title VII or an alternative statutory remedy, federal employees would be without any means to redress discriminatory treatment "that backpay or other compensatory relief," *id.* at 826, 96 S.Ct. at 1965; it merely noted, based on legislative history, that Congress desired a remedy to be available and reasonably perceived an absence of effective remedies then (in 1972) in existence. The two cases cited by the Court as substantiating the reasonableness of Congress' perception, *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934, 90 S.Ct. 941, 25 L.Ed.2d 115 (1970), and *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971), both denying the availability of damages, were decided prior to the Supreme Court's seminal decision in *Bivens*. Obviously, nothing in *Brown* determines that Congress may negate the existence of a cause of action to vindicate a constitutional right without providing an alternative and equally effective remedy. *See Davis v. Passman*, 544 F.2d at 874–76 (panel opinion). Congress did provide an acceptable alternative for those employees covered by Title VII. It provided nothing for Ms. Davis or those in her position.

18. The choice properly before this court is one between alternative remedies. No party before us has suggested that we undertake to fashion a remedy precisely analogous to that provided by Title VII, if indeed such a remedy is within our judicial power. While this court may, and should, consider congressional policies in choosing the appropriate remedy, we should not refrain from adopting such judicial remedies as are available and meaningful to the plaintiff merely because Congress has adopted a constitutionally sufficient but different remedial scheme for other employees. It is no answer that the only available judicial remedy might be more favorable than the remedy fashioned by Congress if the only alternative to a more favorable remedy is no remedy at all.

nism normally available in the federal courts,"

403 U.S. at 397, 91 S.Ct. at 2005, recalling that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

403 U.S. at 392, 91 S.Ct. at 2002, *quoting Bell v. Hood*, 327 U.S. at 684, 66 S.Ct. 773. For ours is the "particular responsibility to assure the vindication of constitutional interests . . . ." 403 U.S. at 407, 91 S.Ct. at 2010 (Harlan, J., concurring).

I am also unpersuaded by the majority's suggestion that while fourth amendment violations "occur in a well-defined setting familiar to the courts,"[18a] damage remedies for due process violations in general, and equal protection claims in particular, are somehow not "judicially manageable." *See* majority opinion, *supra*, at p. ——, slip op. at pp. 3512–3513. As the Court observed in *Bivens*, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395, 91 S.Ct. at 2004 (citations omitted). I have little doubt that the experience of judges in dealing with employment discrimination claims "supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion" of equal protection rights of the sort asserted here. *Cf.* 403 U.S. at 409, 91 S.Ct. at 2011 (Harlan, J. concurring). The en banc court's analysis of this factor, to the extent it is not reducible to another floodgates argument, seems to me an argument against the validity of *any* means of vindication of equal protection rights, not simply against the choice of damages as an appropriate remedial mechanism. With respect to this factor as well as the preceding one, the en banc majority's mechanical application of the *Cort* statutory criteria as somehow "relevant and worthy of consideration" fails to consider the distinctive features of implication of rights di-

18a. The majority apparently also finds, in *Bivens'* responsiveness to "the particular difficulties presented in enforcing the guarantees of the fourth amendment," in particular, the "hostility of law enforcement officials to the restraints of the fourth amendment," majority opinion, *supra*, at p. ——, slip op. at pp. 3512–3513, something akin to this third *Cort* factor. The inference the majority draws from this discovery, apparently that the *Bivens* action is uniquely necessary in the fourth amendment context, is one I am unable to follow. For what seems to me decisive in *Bivens* is the fact that whatever remedies were available to others whose fourth amendment rights had been violated, such remedies were meaningless to Bivens himself; thus, the existence of those other remedies was irrelevant to the Court in its decision to create a cause of action to vindicate the rights of the plaintiff in the case before it. Accordingly, there is no need to speculate on the comparative hostility of law enforcement officials to the restraints of the fourth amendment and of Congressmen to the possibility of being answerable in damages for violation of their employees' equal protection rights.

In this respect, it is worth noting that an *amicus* brief was submitted in this case by signatories of the House Fair Employment Practices Agreement, including both Members of Congress and congressional employees. That Agreement provides, *inter alia*, that the signatories will not discriminate against an employee or applicant for employment on the basis of sex. *Amici* "see absolutely no harm to the legislative process if Members of Congress are required to conform to constitutional standards when dealing with their employees." Amicus Brief at p. 3. *See also* 5 U.S.C. § 7151.

rectly from the Constitution and comes to a result contrary to that commanded by *Bivens*.

This is also regrettably true in the court's application of the fourth and final *Cort* factor, whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95 S.Ct. at 2088. The en banc majority's apparent conclusion that this is an apt characterization of a claim by a congressional employee working in a congressional office building alleging sex discrimination violative of the fifth amendment to the United States Constitution by a member of Congress seems to me a novel view of the operation of "Our Federalism." The majority, intent on avoiding the horrors, real or imagined, of a flood of procedural due process claims carrying along traditional state tort actions, here as elsewhere never comes to consider the facts of the case before it.[19]

Nor is this case in any sense an attempt to end-run possible statutory limitations of § 1983, unlike the only two Court of Appeals cases cited by the en banc majority as declining to imply *Bivens* actions from the due process clauses. *See* majority opinion, *supra*, at n. 4. In *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977), the First Circuit refused to imply a right of action for vicarious liability against a municipality under the fourteenth amendment in the teeth of Supreme Court decisions foreclosing municipal liability under § 1983. In distinguishing the result in *Bivens* the *Kostka* court noted that the plaintiffs before it "here have available to them a right of action which is measured by constitutional standards: § 1983," *Id.* at 42, and resisted the attempt to impose vicarious liability on a municipal "deep pocket defendant", *id.* at 41, given "something akin to an explicit Congressional determination that political subdivisions are not to be held liable in damages" when "municipal employees violate individuals' constitutional rights." *Id.* at 43. The court suggested that "the existence of a statutory remedy which is designed to implement the constitutional guarantee may itself render the *Bivens* analysis inappropriate," *id.* at 42, and made the precise inquiry which the majority refuses to make here: "We cannot say that the remedial scheme enacted by Congress—permitting damages recoveries under limited circumstances and injunctive relief whenever there has been a sufficient prior threat of harm—does not adequately implement the constitutional guarantees, at least in cases in which

19. The en banc majority quotes *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), to the effect that "the range of interests protected by procedural due process is not infinite." *Id.* at 709, 96 S.Ct. at 1164, *quoting Board of Regents v. Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). *Paul*, of course, rejected "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701, 96 S.Ct. at 1161 (emphasis added). Without engaging in any polemical discussion about the wider implications of *Paul*, we note first, that Ms. Davis' damages include a loss of employment; second, that her claim is bottomed on equal protection and not on procedural due process; and third, that vindication of Ms. Davis' fifth amendment claim is in no way inconsistent with the Court's observation in *Paul* that the fourteenth amendment "did not alter the basic relation between the States and the national government." *Id.* at 700, 96 S.Ct. at 1160, *quoting Screws v. United States*, 325 U.S. 91, 108-09, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495 (1945).

there has been no municipal involvement in the wrongdoing." *Id.* at 44.

Kostka is in no sense inconsistent with the result urged in this dissent and is remarkably similar in its analysis to the approach advocated here. The *Kostka* court observed the Supreme Court's direction to "carefully assess the existing remedies," *id.* at 42, and to "focus on the precise remedy plaintiffs wish us to create." *Id.* at 44. The First Circuit found that Congress had created in § 1983 a statutory remedy "designed to implement the constitutional guarantee" against those individuals directly responsible for the alleged violations of Kostka's constitutional rights[20] and rested its decision on the adequacy of that remedy.[21] Congress had provided *no* remedy to redress the constitutional wrongdoing here. The en banc majority, unlike the *Kostka* court, must respond to this fact; it has not done so.[22]

V.

The en banc court also expresses a fear that "implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary" and "render meaningless the power the Constitution vests in Congress under Article III, Section 1 of the Constitution to es-

20. The court noted that qualified immunity might be available to those individuals, *id.* at 40; defendant here also claims the availability of absolute or qualified immunity. The *Kostka* court properly recognized that immunity is analytically distinct from the implication of a constitutional cause of action and should be addressed with respect to its own underlying policies. In the case at bar, to the extent the immunity issue is relevant to the choice of an appropriate remedial mechanism, the underlying policies weigh in favor of the damages relief sought here. *See* text, *supra*, at p. ——, slip op. at p. 3528.

21. The *Kostka* court's determination that the § 1983 remedy was adequate was explicitly limited to "cases in which there has been no municipal involvement in the wrongdoing." *Id.* at 44. "Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different." *Id.* at 45. Here there can be no doubt that if wrongdoing was done, the defendant Passman was responsible for doing it.

22. In *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), the second Court of Appeals case cited by the en banc majority, the Third Circuit faced a claim somewhat similar to that advanced in *Kostka*. The Third Circuit found that "[i]f plaintiffs prove the racially motivated deprivations of their rights which they allege, section 1981 will afford them the redress in federal court which they seek" and affirmed the district court's dismissal of fourteenth amendment claims on the basis of *Bivens*' teaching "that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on the plaintiffs' behalf." *Id.* at 1024-25 (citations omitted). Judge Garth, dissenting in part and concurring in part, argued that no fourteenth amendment cause of action could ever be asserted against a city. Judge Garth's reasoning was based in part on logic akin to the *Kostka* courts, and in part on the observation

> that the framers of the Fourteenth Amendment intended to confer upon *Congress*—not the courts—the primary responsibility for developing appropriate measures to enforce the Amendment. Section five of the Fourteenth Amendment provides that 'Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' None of the first eight Amendments contains a similar provision. *Compare Bivens* . . (implied cause of action under Fourth Amendment); *Paton v. LaPrade*, 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *United States ex rel Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (Fifth Amendment).

Id. at 1059. Perhaps needless to say, we find nothing in Judge Garth's observation or in the opinion of the *Mahone* majority inconsistent with the core analysis proposed in this dissent for Ms. Davis' fifth amendment claim.

tablish the jurisdictional ambits of the inferior courts it has created." *See* majority opinion, *supra*, at pp. ——, ——, slip op. at pp. 3514-3515. Once again, the mechanism of this transformation is more clear to the majority than it is to me; I would have thought the wording and history of 28 U.S.C. § 1331(a), committing to the federal courts jurisdiction of actions "arises under *the Constitution*, laws, or treaties of the United States" exemplify a rather unambivalent exercise by Congress of its Article III powers.[23]

VI.

As I would hope the foregoing illustrates, one need not abandon or demean technical legal analysis to uphold a right of action for damages implied directly from the due process clause of the fifth amendment. But I would be less than candid in suggesting that broader philosophical and jurisprudential concerns are not also implicated in the decision of this case. Other courts have spoken of "*Bivens'* sweeping approbation of constitutionally-based causes of action." *Brault v. Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975); *see also Gardels v. Murphy*, 377 F.Supp. 1389 (N.D.Ill.1974). To some, *Bivens* may be an abhorrent aberrance in our jurisprudence, but to me its benevolent embrace of constitutional rights is a treasure in our judicial trove. I would not desecrate one syllable of that opinion by deviating from its high purpose.

While constitutional interpretation may be subject to ebb and flow, I have never understood the task of the federal judiciary to be the damming—or damning—of rights that spring from that noble document. Courts are not engineers, floodgating constitutional rights. The

23. The en banc majority, while referring at one point to its "affirmance on the jurisdictional ground," majority opinion, *supra*, at p. ——, slip op. at p. 3515, explicitly states elsewhere that its affirmance is based on the ground "that the law affords Davis no private right of action." *Id.* at p. — --, slip op. at p. 3508. I read the court's decision as in fact finding proper jurisdiction over this case under 28 U.S.C. § 1331(a) and proceeding to a decision on the merits, under Fed.R.Civ.P. 12(b)(6), that the due process clause of the fifth amendment does not support an implied cause of action for damages. Accordingly, jurisdiction will no longer lie in the courts of this circuit to entertain damage actions "arising under" the fifth amendment's due process clause. It is only in this sense that *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976), is overruled. I do not understand the court's action on today as denying the analytic soundness of *Weir's* statement that "The jurisdictional issue here is entirely separate from the [question] whether the complaint states a claim on which relief can be granted," *id.* at 873, citing *Bell v. Hood* and *Bivens*. *See also Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977).

> The question of subject matter jurisdiction is, of course, distinct from that whether plaintiffs have stated a claim upon which relief may be granted. So long as a claim for federal relief is not frivolous, the action arises under federal law for purposes of § 1331 and the federal court has jurisdiction to adjudicate the claim that a federal right of recovery exists. Since no . . . decision forecloses us from inferring a remedy under the Fourteenth Amendment and since *Bivens* gives the plaintiff's claim at least surface plausibility, we have jurisdiction under § 1331.
>
> *Id.* at 41 n. 5 (citations omitted); *Mahone v. Waddle*, 564 F.2d 1018, 1022 (3rd Cir. 1977).

Thus, the court's decision today does not remove jurisdiction from the district courts to entertain *Bivens*—style claims brought under constitutional provisions other than the due process clauses. In each case, so long as the federal claim is not frivolous or barred by a decision of this Circuit or the Supreme Court, jurisdiction will lie for a particularized inquiry, of the sort accorded the due process clause in this case, as to whether a cause of action has been stated.

Supreme Court has spoken, definitively, on the existence of an action for damages flowing directly from the fourth amendment. While judicially self-executing constitutional rights may be exiguous, I find nothing in logic, history, or precedent that directs the building of a floodgate between the fourth amendment and the fifth. On examining the constitutional blueprints I, like the majority, find a right embodied in the fifth amendment; I unlike the majority, would allow that right to be vindicated. If vindication is to be denied, and the *Bivens* landmark washed away in a new constitutional downpour, I would prefer that the cloudburst come not from us, but from the Supreme Court on high. Like Noah, who waited forty days and forty nights, I have faith that the rainbow will finally emerge.[24]

Congress in its wisdom may provide a mechanism for enforcement of a constitutional right, and that mechanism, if effective, is entitled to some measure of judicial deference. But congressional disinclination to provide a means of enforcement does not—cannot—mean that a constitutional right is obliterated. Statutory actions may give breath to constitutional rights, but congressional inaction cannot suffocate them. In the case at hand, Congress has provided no remedy; therefore, the words of the Constitution must be our guiding star. We must not be misdirected by fear of losing our way in some celestial darkness in the limitless expanse of constitutional space. Not legal science but legal astrology limits *Bivens'* applicability to the fourth amendment, severing the cusp between the fourth and the fifth solely in accordance with the motions of our docket. Were crowded dockets to be our gyroscopes, courts might routinely strip litigants of their constitutional rights out of fear that others might follow their juridicial path. I fear that is the slippery slope my brethren embark upon today.

In *Bivens* the Court founded a cause of action for damages directly on the fourth amendment. There is no reason to believe the fifth amendment stands in an inferior position to the fourth. The fifth amendment is constitutionally prime and in constitutional mathematics shares a common denominator with the fourth: the obligation of the federal judiciary "to assure the vindication of constitutional interests." If *Bivens* be a jurisprudential thorn or sport, let the Supreme Court pluck it out. Those of us who sit in a lower judicial caste need not attempt this extirpation.

I have given myself the *Allen* charge. Distasteful as it is to me, I cannot find it possible to yield my conscience to the preponderant majority, respectful as I am of my brothers' intellect, their integrity, their dedication and their loyalty to constitutional privileges. In sorrow I mourn their error.

24. I am reinforced in my faith by the undeniable fact that the two-by-two ascent into the ark was in conformity with equal protection norms.

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APPENDIX B

DAVIS v. PASSMAN
Cite as 544 F.2d 863 (1977)

Shirley DAVIS, Plaintiff-Appellant,

v.

Otto E. PASSMAN, Congressman of the United States, Defendant-Appellee.

No. 75-1691.

United States Court of Appeals, Fifth Circuit.

Jan. 3, 1977.

Action was brought against a member of the United States House of Representatives, alleging that he violated the Fifth Amendment by discharging a female staff member because of her sex. The United States District Court for the Western District of Louisiana, Tom Stagg, J., dismissed and former staff member appealed. The Court of Appeals, Goldberg, Circuit Judge, held that, taking the complaint's allegations as true, the Representative's dismissal of a staff member on the basis of gender violated the equal protection component of the Fifth Amendment due process clause; that the Fifth Amendment itself afforded the dismissed staff member a damages remedy; that sovereign immunity did not bar a damages award against the Representative individually; that the speech or debate clause does not extend to staff dismissals because they are not "legislative tasks"; and that the Representative had no absolute immunity from suit for dismissal of staff members.

Reversed and remanded.

Jones, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, Chief Judge, and JONES and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

In this case a member of the United States Congress unflinchingly asserts that the Constitution allows him openly to discriminate against women. He asserts further that he need not so much as suggest a single basis for the discrimination. The issue is not to be trivialized. We have here a conflict of transcendental importance between the rights of the individual and the rights of a representative qua representative. Although representatives admittedly have some insulation not wrapped around ordinary mortals, the conflicting interests must be harmonized, not dichotomized. Finding that our Constitution protects individual rights even against the mighty, we remand this case for trial.

In the early part of 1974 Shirley Davis was Deputy Administrative Assistant to Representative Otto E. Passman of the Louisiana Fifth Congressional District. The Representative terminated Davis's employment effective July 31, 1974. In his letter to her explaining the termination decision the Representative wrote, "You are able, energetic and a very hard worker.

[H]owever, on account of the unusually heavy workload in my Washington office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant be a man." The full text of this rather remarkable letter is set out in the margin.[1]

1. Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work, however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,

/s/ Otto E. Passman

Member of Congress

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Davis then filed this action against the Representative, claiming he had violated the equal protection component of the fifth amendment's due process clause. She invoked the court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331(a), and she sought specific relief, damages and declaratory relief.

The Representative moved to dismiss the complaint on three grounds: that his conduct was not unconstitutional, that the law afforded Davis no private right of action, and that the doctrines of sovereign and official immunity barred the action. The district court rejected the immunity argument but dismissed the action on the first two points. We reverse, finding that Davis's allegations, if proved, will establish a constitutional violation for which she has a private right of action. We agree with the district court that the immunity doctrines do not bar the suit.

I. Constitutionality

[1, 2] Although the fourteenth amendment's equal protection clause applies only to the states, the fifth amendment's due process clause contains an equal protection component applicable to the federal government. *See, e. g., Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *N. L. R. B. v. Sumpter Plywood Corp.*, 535 F.2d 917, 930 n.22 (5th Cir. 1976). Moreover, recent Supreme Court decisions establish beyond dispute that, just as sex discrimination by the states violates the fourteenth amendment unless supported by sufficient justifications, *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), sex discrimination by the federal government violates the fifth amendment. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). We must therefore address two questions: whether the alleged conduct constituted sex discrimination, and if so whether sufficient governmental interests validate the discrimination.

A. *Discrimination*

[3] In the case at bar the first question is easily answered. Davis's allegations, which must of course be taken as true in evaluating the Representative's motion to dismiss, *see, e. g., Radovich v. National Football League*, 352 U.S. 445, 448, 77 S.Ct. 390, 1 L.Ed.2d 456 (1956); *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491, 493 (5th Cir. 1976), clearly make out a case of sex discrimination. The Representative's termination letter offered but a single reason for Davis's dismissal: she was a woman; the job called for a man.

The Representative argues, however, that unconstitutional sex discrimination occurs only when the sex-based classification is embodied in a statute and only when the actor is someone other than a member of Congress. With respect to the first point he correctly notes that the statute upon which his dismissal of Davis was predicated,

2 U.S.C. § 92, is nondiscriminatory on its face; it allows dismissal of both male and female staff members with or without cause. The Representative also correctly notes that neither *Frontiero* nor *Wiesenfeld* compel rejection of his position; both of those cased invalidated *statutory* classifications.[2]

[4] The Representative's argument that equal protection principles apply only to statutory discrimination, however, contravenes a long and unbroken chain of decisions. The Supreme Court clearly rejected the argument as long ago as 1886. In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) the Court held that the discriminatory application against Chinese Americans of facially neutral building regulations violated the equal protection clause. The passage of time has enhanced, not diminished, the position of *Yick Wo* as a pillar of our jurisprudence. Numerous more recent decisions have struck down nonstatutory discriminations, usually without even pausing to note explicitly that equal protection principles are not limited to statutes. *See, e. g., Keyes v. School District No. 1*, 413 U.S. 189, 201, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Foster v. Sparks*, 506 F.2d 805 (5th Cir. 1975); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).

Equal protection scrutiny of inconsistencies in the application of facially nondiscriminatory statutes is not, of course, without limits. In *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed.2d 497 (1944) a state elections official refused to follow a state law requiring that a successful primary candidate be certified for inclusion on the general election ballot. The Court rejected the candidate's argument that this isolated failure to apply the state law to everyone equally constituted a denial of "equal protection of the laws." The Court laid down the governing standard:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who [were] entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Snowden v. Hughes, supra, 321 U.S. at 8, 64 S.Ct. at 401.

Davis's complaint clearly meets the *Snowden* requirements. The only digressions from neutral statutory provisions that *Snowden* exempts from equal protection scrutiny are those isolated incidents not based on a *classification*.[3] Here Representative Passman established a classification; he divided potential deputy administrative assistants into one group of men and another of women. The termination letter, at least on its face, is an open declaration of "intentional" and "purposeful" sex discrimination.

Therefore, Representative Passman will be free at trial to demonstrate that the firing was not in fact based upon Davis's gender, but he can derive no support from the nonstatutory nature of the discrimination. The constitutional guarantee of freedom from invidious discrimination would ring hollow indeed if it could be bypassed by the simple expedient of implementing the discrimination under a facially neutral statute. That the alleged discrimination was not embodied in a statute is of no moment.[4]

[5, 6] Representative Passman's contention that the constitutional ban on unjustified sex discrimination does not restrict the actions of members of Congress is equally untenable. He argues, in effect, that his congressional status endows him with an open-ended right to discriminate irrespective of the time, place and condition of the discrimination.[5] A representative, however, is as subject to constitutional standards when hiring employees as when acting in concert with other members of Congress to enact legislation. A representative is not an imperator and is never above and beyond the law; any other view could not be squared with the whole predicate upon which our constitutional life depends. The need for wide discretion in staff employment decisions cannot be ignored, but the constitutional proscription of blatant sex discrimination does not impair Representative Passman's legitimate control over his staff to any extent at all. The Constitution does not force him to hire by the slide rule, but at the same time it does not permit him to slide into unbridled discrimination. The geometry of congressional discretion in hiring and firing is neither apogean nor perigean. We must equilibrate. Representative Passman can certainly assemble a capable and competent staff without engaging in the sex discrimination alleged here. The applicable constitutional standards may give a representative greater leeway in employment decisions than other government entities possess, and at trial Representative Passman may be able to show that he has not transgressed the constitutional requirements. All we need decide for purposes of this appeal, however, is that at some point invidious discrimination by a representative in his or her employment decisions is unconstitutional. Davis's allegations are certainly sufficient to entitle her to go to trial in an effort to show that this is such a case.[6]

2. *Frontiero* confronted a statutory scheme dealing with benefits afforded members of the uniformed services for their "dependent" spouses. A serviceman could claim his wife as a dependent without regard to actual dependency, whereas a servicewoman could claim her husband only if he was shown to be dependent upon her for over one-half of his support. The court invalidated the scheme. Similarly, *Wiesenfeld* struck down a provision of the Social Security Act that granted a widow, but not a widower, benefits based on the deceased spouse's earnings.

   Supreme Court decisions invalidating state sex discriminations have also involved statutes. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) held unconstitutional an Idaho statute under which male candidates to administer an estate were preferred over equally-qualified female candidates. *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) struck down a Utah statute that established a greater age of majority for males than for females.

3. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) supports this analysis. There the Supreme Court upheld the District of Columbia Metropolitan Police Department's use of Test 21 to screen applicants. The test allegedly excluded a disproportionate number of black applicants and would therefore have been invalid under Title VII and *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). But the action had been brought before Title VII was made applicable to the federal government in 1972, and the Constitution itself provided the governing standard. See 426 U.S. at 238, n. 10, 96 S.Ct. 2040.

   Unlike the situation in *Snowden*, the challenged action in *Washington* did reflect a classification; applicants were separated into one group that passed the test and another that did not. Equal protection scrutiny was therefore appropriate. Because the Court found no racially discriminating purpose, an issue as to which racially disproportionate impact was relevant but not dispositive, it did not invoke the stringent equal protection scrutiny that attends racial classifications. The Court upheld the challenged classification, finding it sufficiently related to the legitimate goal of modestly upgrading the communicative abilities of government employees. 426 U.S. at 245-246, 96 S.Ct. at 2050, 48 L.Ed.2d at 610.

4. Although *Yick Wo* and the other cited decisions were decided under the fourteenth amendment, the equal protection component of fifth amendment due process contains the same principle. There is no reason to exempt the federal government from the principle that discriminatory applications of nondiscriminatory statutes must meet equal protection guidelines, as *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) implicitly recognized. *See* note 3 *supra*.

5. Whether the courts can redress a representative's transgressions of the constitutional standards presents a separate issue. Representative Passman asserts not only that he is immune from suit, but also that even apart from the possibility of redress, the Constitution does not prohibit him from discriminating on the basis of gender.

6. To eliminate any confusion we note that appellant need not demonstrate the denial of any "property" interest. Although the due process clause extends only to deprivations of "life, liberty, or property", a violation of the clause's equal protection component is necessarily a deprivation of "liberty". Therefore, decisions under the due process clause's equal protection component, like substantive due process decisions, make no reference to the "life, liberty, or property" requirement. *See, e. g., Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975).

B. *Justification*

The next issue is whether the alleged discrimination is constitutional because supported by sufficient governmental interests. Whether the interests supporting a sex discrimination must be "compelling" is unsettled. In *Frontiero* four justices said sex was a "suspect classification" calling for strict judicial scrutiny. *See* 411 U.S. at 682–88, 93 S.Ct. 1764 (plurality opinion by Brennan, J.). Under that approach the government must show a compelling interest. Three justices, however, reserved the "strict scrutiny" issue saying the classification there was unconstitutional in any event. 411 U.S. at 691–92, 93 S.Ct. 1764 (Powell, J., concurring). The earlier case of *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and the subsequent cases of *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) and *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), invalidated sex discriminations without addressing the strict scrutiny issue.[7] In these decisions the Court clearly applied more than the minimal rationality test that characterizes equal protection decisions in some other areas, however, and sex-based classifications must withstand at least middle-level equal protection scrutiny.[8]

In the case at bar we can follow the Supreme Court's lead and refrain from specifying the applicable standard. Indeed, we need not even apply the substantial scrutiny that has characterized the Court's decisions. For here Representative Passman offers no governmental interest at all in support of the sex-based classification, and we can imagine none.[9] The qualifications for the post of deputy administrative assistant simply have nothing to do with gender. The Representative's suggestion in his letter that the job requires a man because of the "unusually heavy work load" and the "diversity of the job" is patently ridiculous. Understandably, the Representative has abandoned that rationale on this appeal. The Representative will be free at trial to pursue his contention that gender was not the basis of Davis's dismissal, but if he is unsuccessful the firing cannot escape constitutional condemnation.

II. Availability of Relief

Having determined that Davis has alleged a constitutional violation, we must now determine whether the claim is one upon which relief can be granted. In substance, Davis seeks three forms of relief: specific relief, damages, and a declaration. We deal with each in turn.

A. *Specific Relief*

The specific relief Davis seeks includes reinstatement, promotion and an injunction against unlawful discrimination directed toward her. The injunction claim might raise a sovereign immunity issue under our decisions in *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971) and *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1973), even though the Supreme Court has said in *Larson v. Domestic*

7. The holdings of *Reed*, *Wiesenfeld* and *Stanton* are outlined in note 2 *supra*. *See also Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (Florida statute giving widows but not widowers a $500 property tax exemption upheld as substantially related to the legitimate object of cushioning the disproportionate financial difficulties confronting a lone woman); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (different tenure provisions for military men and women sustained because, under unchallenged scheme restricting the military role of women, service men and women are not similarly situated).

8. For discussion of intermediate equal protection standards, see *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 98–110, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting); *Vlandis v. Kline*, 412 U.S. 441, 458–59, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) (White, J., concurring); Gunther, The Supreme Court, 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L.Rev. 1 (1972).

9. We therefore need not decide whether we would consider justifications occurring to us but not asserted by the Representative. The extent to which equal protection courts will consider supporting interests not put forward by the government is unsettled and may vary with the governing equal protection standard.

and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) that sovereign immunity does not bar suits against federal officials alleging that they acted unconstitutionally. *See Penn v. Schlesinger*, 490 F.2d 700, 703–04 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976). In addition, the reinstatement and promotion prayers, while impervious to sovereign immunity attack because in the nature of mandamus, *see Penn v. Schlesinger, supra; Beale v. Blount, supra*, would raise difficult issues concerning the proper exercise of equitable remedial discretion. In *Abbott v. Thetford*, 534 F.2d 1101 (5th Cir. 1976) (en banc) we refused to order a judge to reinstate his chief probation officer because the probation officer's personal criticisms of the judge made the necessary cooperative and confidential relationship impossible.[10] Although Davis has not, so far as this record shows, done anything to antagonize the Representative other than bring this lawsuit to vindicate her constitutional rights, we would remain very hesitant to order reinstatement of a representative's personal assistant. *Cf. Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng.Rep. 687 (Ch. 1852).

Intervening events, however, have blunted the importance of these issues. We take notice that Representative Passman was defeated in the 1976 primary election. His tenure in Congress will therefore apparently come to an end on January 3, 1977. That the term is not yet completely over saves the specific-relief claims from technical mootness, but they have certainly lost their significance. We assume Davis will not press her reinstatement or injunction prayers, and we pass on to other remedies.

B. *Damages*

Davis's damages claim takes us through a five-stage analysis. First, damages are available under the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Second, the Supreme Court's more recent decision in *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) does not affect the *Bivens* remedy under the circumstances here. Third, sovereign immunity does not bar Davis's claim for damages against Representative Passman individually. Fourth, the speech or debate clause does not shield the Representative. Fifth, although the Representative can assert qualified official immunity at trial, that doctrine is insufficient to support a motion to dismiss. In sum, Davis's damages claim must be remanded for trial.

1. *Bivens*

[7] Davis's claim for damages is predicated upon *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra*. There the Supreme Court held that a damages remedy for an unconstitutional search and seizure could be implied directly from the Constitution itself. The Court rejected the government's argument that the complainant should have been relegated to a state law tort action and that the Constitution's sole function was to limit the scope of the officers' privilege defense, holding that the constitutional damages action was independent of state tort law. The Court explicitly rejected the government's argument that damages should be available only if "necessary to enforce the Fourth Amendment." 403 U.S. at 397, 91 S.Ct. at 2005. Among other things, the Constitution is a compendium of rights, and their enforcement does not depend upon statutory enrollment. As *Bivens* establishes, legislative inaction does not vitiate constitutional rights. Statutory actions may give breath to constitutional rights, but congressional inaction cannot suffocate them.

10. In *Abbott* the en banc court adopted Judge Gewin's dissent from the panel opinion, *see* 529 F.2d 695, 701–08 (5th Cir. 1976).

[8] Although Davis's claim arises under the fifth amendment, not the fourth, we find no basis in *Bivens*' language or rationale for according any significance to this distinction. The rights protected by the fifth amendment due process clause are every bit as fundamental as fourth amendment rights. Here, as in *Bivens*, damages simply constitute "a particular remedial mechanism normally available in the federal courts," 403 U.S. at 397, 91 S.Ct. at 2005.

Indeed, here the case for implying a damages remedy is even stronger than in *Bivens*. In the *Bivens* situation state tort law is available to remedy some constitutional violations, and the exclusionary rule also sometimes provides a remedy. The case for implying a constitutional damages remedy becomes more compelling when, as here, there is no meaningful alternative remedy. Mr. Chief Justice Marshall's time-honored call for justice provides a guiding principle not lightly to be ignored: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), quoted in *Bivens, supra*, 403 U.S. at 397, 91 S.Ct. [1999] at 2005.

Our conclusion that *Bivens* is not limited to fourth amendment claims draws support from various court of appeals decisions. We have ourselves upheld an arrested person's complaint seeking damages directly under the Constitution for the denial of proper medical care. We said that the conduct might have violated the fourteenth amendment's due process clause or the eighth amendment, and that the complaint stated a damages claim. *See Reeves v. City of Jackson, Mississippi*, 532 F.2d 491, 495 (5th Cir. 1976). *See also Roane v. Callisburg Independent School District*, 511 F.2d 633 (5th Cir. 1975) (fourteenth amendment due process). Other circuits that have decided the issue are in accord. *See Brault v. Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975) (damages action for fourteenth amendment due process violation "comes within *Bivens*' sweeping approbation of constitutionally-based causes of action");[11] *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (fifth amendment due process);[12] *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974), (fifth amendment due process).[13] In extending *Bivens* to fifth amendment due process claims, *States Marine* used language squarely applicable in our case:

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.

498 F.2d at 1157.

[9] Finally, we note that measuring damages presents no insuperable problem. Representative Passman was free, within constitutional limits, to dismiss Davis at any time. But if the actual dismissal is found at trial to have been unconstitutional, then lost salary should be taken into account in assessing damages. The situation is analogous to a substantively justified dismissal accomplished in a procedurally unconstitutional way. That a defendant could have dismissed an employee without violating the Constitution has never been thought to preclude the award of damages for a dismissal that was in actuality unconstitutional. *Cf. Silver v. New York Stock Exchange* 373 U.S. 341, 365 n.18, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

2. *Brown*

[10] Our conclusion, then, is that *Bivens* gives Davis a damages remedy for Representative Passman's deprivation of her due process rights. We pause briefly, however, to reject the notion that sweeping language in a recent Supreme Court decision dictates a contrary result. In *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) the Court held that the 30-day limitation on bringing Title VII employment discrimination suits against the federal government could not be avoided by the simple expedient of bringing the action directly under the Constitution. The *Brown* holding is inapplicable here because Davis never had a Title VII action. Title VII excludes members of congressional staffs from its protection.[14]

The inapplicability of the *Brown* holding does not, however, answer the contention that some of its language seems on casual examination to preclude Davis's constitutionally based claim. The issue arises from Mr. Justice Stewart's framing of the *Brown* issue:

> The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment.

425 U.S. at 821, 96 S.Ct. at 1963, 48 L.Ed.2d at 405. Taken for all it might be worth, this language would deny Davis not only a damages remedy but any remedy whatsoever.

We refuse to accord the language such broad scope. In the first place, a moment's reflection indicates the incongruity of importing Mr. Justice Stewart's language into our case. It simply makes no sense to speak of an "exclusive judicial remedy" when there is no remedy at all. *Brown* establishes that Title VII is the exclusive judicial remedy for federal employment discrimination to which Title VII extends, but in areas not touched by Title VII other remedies are not affected.

This is conclusively established by *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), decided the very same day as *Brown*. In *Mow Sun Wong* the Court invalidated the Civil Service Commission's rule excluding aliens from most federal employment.[15] Title VII does not prohibit discrimination against aliens, *see Espinoza v. Farah Manufacturing Co.*,

11. *Brault* addressed the complicating issue, not present in our case, of whether the exclusion of cities from the definition of "person" in 42 U.S.C. § 1983 affected the existence of the *Bivens* cause of action. *See generally* Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv.L.Rev. 922 (1976). *Brault* upheld the constitutional action despite § 1983. We reached the same result in *Roane v. Callisburg Independent School District, supra* and *Reeves v. City of Jackson, Mississippi, supra*. *See also Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); *Fine v. City of New York*, 529 F.2d 70, 77 (2d Cir. 1975) (Smith, J., concurring and dissenting). *Cf. Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3rd Cir. 1976); *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976).

12. *Moore* extended *Bethea v. Reid*, 445 F.2d 1163 (3rd Cir. 1971), *cert. denied* 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (1972) (fourth and fifth amendments).

13. In addition to the Second, Third and Fourth Circuit holdings cited in text, the Tenth Circuit has intimated that *Bivens* extends beyond the fourth amendment. *See Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975). The issue is open in the D.C. Circuit. *See Lewis v. D.C. Dep't. of Corrections*, 174 U.S. App.D.C. 483, 533 F.2d 710 (1976). Although the district courts have split, the best reasoned opinions have reached our result. *See, e. g., Panzarella v. Boyle*, 406 F.Supp. 787 (D.R.I. 1975).

14. 42 U.S.C. § 2000e-16(a) makes the federal government employment discrimination provisions inapplicable to legislative branch positions not in the competitive service, and congressional staffs are not in the competitive service.

15. The *Mow Sun Wong* plaintiffs challenged the commission's rule under the fifth amendment's equal protection principle. The Court noted that overriding national interests might conceivably provide a justification for a citizenship requirement in the federal service. Without resolving that issue, the Court held that due process required that there be a legitimate basis for presuming that the rule was actually intended to serve the asserted national interest. Because the rule had been adopted by the Civil Service Commission, whose only concern was the promotion of an efficient federal service, the Court found no basis for assuming that it was in fact intended to further any overriding national interests. Accordingly, the Court invalidated the rule, at least pending presidential or congressional approval of its policy.

414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), just as Title VII does not prohibit sex discrimination against congressional staff members. In *Mow Sun Wong* the Supreme Court thus accorded a non-Title VII judicial remedy for a claim of federal employment discrimination. By its action on the very same day *Brown* was decided, the Court made clear that the "exclusive remedy" language applies only to employment discrimination covered by Title VII.[16]

[11] We need not, however, rely solely on *Mow Sun Wong*. The whole structure of the Court's argument in *Brown* has no relevance to discriminations not within Title VII's domain. The Court first argued that when Congress extended Title VII to federal employment in 1972 it believed, rightly or wrongly, that no other remedy existed. From this the Court deduced that Congress fashioned a remedy believed adequate standing alone to cure the discriminatory ills being brought within the ambit of Title VII. But Congress's belief that no remedy existed, coupled with its failure to enact any remedy, scarcely demonstrates a belief that no remedy was needed for discrimination left outside Title VII. For, as is well established, Congress need not address all facets of a problem in a single piece of legislation; it is free to enact remedial legislation element by element at a pace most acceptable to the legislative mind. *See, e. g., Railway Express Agency v. New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949).

The *Brown* Court's second line of argument is equally inapplicable to discriminations outside Title VII. It reasoned that

> [t]he balance, completeness and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief.

425 U.S. at 832, 96 S.Ct. at 1968, 48 L.Ed.2d at 411.

The Court was certainly correct that the "balance, completeness and structural integrity" of the statute would be undermined if its 30-day limitations period could be rendered meaningless by bringing an action on some other basis. The "structural integrity" of the statutory prerequisites to invoking Title VII cannot be undermined, however, by the provision of a remedy for conduct not governed by Title VII. Our decision leaves Title VII fully operative within its sphere.

In addition, we note another obstacle preventing *Brown* from affecting our case. The *Bivens* remedy is based on the Constitution itself. We remain ever willing to defer to congressional views, but we cannot do so at the expense of constitutional principles. Nothing in *Bivens* suggests Congress could repeal the damages remedy without enacting a suitable alternative. The Court did say, in rejecting defendants' argument that the issue was whether the damages remedy was "necessary" to enforce the fourth amendment, that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." 403 U.S. at 397, 91 S.Ct. at 2005. The case at bar is no different in this respect than *Bivens*. The 1972 additions to Title VII cannot be said to constitute an "explicit" congressional disapproval of the damages remedy, and more fundamentally there is not "another remedy, equally effective in the view of Congress," to which Davis has been remitted. Moreover, even if we somehow ignored these plain truths, the *Bivens* passage would simply mean that the relevant inquiry would be whether a damages remedy is "necessary" to enforce the fifth amendment due process clause. Under this framing of the issue, at least until an alternative remedy were made available, Davis would still prevail. Congress is free to enact an adequate substitute remedy; to that extent the *Bivens* remedy therefore constitutes constitutional common law. *See* Monaghan, The Supreme Court, 1974 Term—Forword: Constitutional Common Law, 89 Harv.L.Rev. 1, 23–24 (1975). Congress has not done so, however, and the constitutionally-based *Bivens* damages remedy is available to Davis here.

When we deal, as we do here, with centrifugal and centripetal forces in operation, we, as judges, must come to a stasis, but in arriving there we do not draw the lifeblood from the legislative process nor skeletonize the constitutional rights with which every citizen is endowed even when dealing with Congress. The exemption of Congress from Title VII does not have a cosmic cover. Title VII among other things implements constitutional rights, but here an open declaration of non-implementation because of the exemption accorded Congress does not import into our case the exclusivity of Title VII actions. When the statute affords relief from a constitutional invasion, the statutory methodology should be followed, but when the statute does not attempt to implement the constitutional rights sought to be vindicated, we cannot then use the statute as the sword to demean or to eliminate the constitutional right. The constitutional right stands on its own words without the necessity of Title VII's supporting procedures. Title VII's exemptions cannot build a haven for constitutional transgressors.

[12] One last issue regarding *Brown*'s effect on the *Bivens* cause of action remains to be canvassed. Congress could attempt to remove the federal courts' *jurisdiction* to hear such claims. Jurisdiction here is predicated upon 28 U.S.C. § 1331(a), as it was in *Bivens*. The amount in controversy exceeds $10,000. Any argument that in expanding Title VII in 1972 Congress excepted constitutionally-based federal employment discrimination claims from § 1331 must be rejected out of hand. Congress did not speak in jurisdictional terms, nor did the Court in *Brown v. General Services Administration, supra*, when it employed the "exclusive judicial remedy" language. In *Hampton v. Mow Sun Wong, supra*, the Court exercised § 1331 jurisdiction over a constitutional challenge to federal employment discrimination, indicating that the Court did not read Title VII's provisions as taking such claims out of § 1331.[17] We hold that the district court has jurisdiction to adjudicate Davis's *Bivens* action on its merits. The damages remedy is available.[18]

16. *Mow Sun Wong* was not a damages case and does not preclude *Brown* from being read to make Title VII the exclusive *damages* remedy for claims of federal employment discrimination. *Mow Sun Wong* does conclusively establish, however, that the Court's broad language in *Brown* is subject to qualifications, and for the reasons developed herein we see no reason to strain to make *Brown*'s language applicable to our case.

17. Moreover, any denial of jurisdiction to hear Davis's claim would itself raise grave constitutional issues. Congress can limit the federal courts' jurisdiction to afford one remedy when minimally adequate alternative remedies are available, *see, e. g., Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943), but our entire constitutional structure and the great esteem we accord individual rights dictate the conclusion that Congress cannot foreclose the last avenue of redress for a constitutional deprivation. *See generally*, P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 330–60 (2nd Ed. 1973) (the "Dialogue"). In the usual situation Congress may have plenary authority to remove the federal courts' jurisdiction because the state courts, having general jurisdiction, remain open to redress constitutional wrongs. The authority of state courts to render relief against a United States Representative under the circumstances here, however, is subject to doubt. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397, 20 L.Ed. 597 (1872). In the absence of any indication that Congress intended the Title VII amendments to cut back on § 1331, we will not attribute to them a meaning of such doubtful constitutionality. *Cf. Johnson v. Robison*, 415 U.S. 361, 366–67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 761, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975); *Gallo v. Mathews*, 538 F.2d 1148 (5th Cir. 1976).

18. Indeed, at oral argument the Representative's attorney apparently conceded that *Bivens* controls:

> Your honor, I acknowledge to the court that if this court should find that there is a federally constituted right then Bivens versus the seven narcotics folks does imply a right of action.

3. *Sovereign Immunity*

After carefully reviewing a variety of sovereign immunity decisions we are perhaps to be excused for concluding that the doctrine's primary effect has been to inject confusion into lawsuits involving the government and its agents. In the case at bar, however, the district court was not misled. It properly rejected the sovereign immunity plea.

[13] At this point we address the applicability of sovereign immunity only to damages actions. When, as here, an action seeks to impose liability upon a government official in an individual capacity, sovereign immunity poses no bar. Although sovereign immunity sometimes shields the United States Treasury from a plaintiff's claims, it does not protect the personal checkbook of an individual government official to any extent at all.

Representative Passman does not contest these principles, nor could he in light of the myriad cases inconsistent with any other view of sovereign immunity. For example, *Bivens* itself would have been barred if actions against government officials individually came within the sovereign immunity doctrine.

[14, 15] The contention Representative Passman does make is that this action is really an attempt to recover against the United States Treasury. Admittedly, Davis's complaint is not free of ambiguity. She did use the phrase "back pay" in her relief prayer, and we could conceivably construe "back pay" as limited to salary from the government rather than damages from Representative Passman individually. Her claim would then contravene *Penn v. Schlesinger*, 490 F.2d 700 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976) where we held sovereign immunity a bar to two forms of money relief "both of which would impinge upon the Treasury." 490 F.2d at 705. We refuse, however, to give the complaint such a niggardly, technical construction. Davis's position in this court makes clear that she seeks damages from the Representative individually, not merely government-paid salary. Moreover, a reading of the complaint as a whole accords with this view. She alleged other items of damages besides lost salary, including injury to reputation,[19] and in addition to "back pay" her relief prayer sought "such other and further relief as may be proper." The named defendant was, of course, Representative Passman, not the United States of America. To read Davis's complaint as not seeking damages against Representative Passman individually would require a return to the technicalities of the common law writ system. The Federal Rules of Civil Procedure countenance no such result. Sovereign immunity does not bar Davis's cla.. a.[20]

4. *Speech or Debate*

[16, 17] We turn now to whether the doctrine of legislative immunity, which in

19. Davis can of course recover lost salary in addition to these other items of damages; we advert to the other items to illustrate that Davis did not use "back pay" in any restricted sense meaning government-paid salary only.

20. A somewhat related line of cases in this circuit deals with whether a city employee can recover money when unconstitutionally discharged. Because a city is not a "person" within 42 U.S.C. § 1983, that statute does not authorize a "back pay" award that would run against the city, even if the nominal defendants are city officials. *Thurston v. Dekle*, 531 F.2d 1264, 1269 (5th Cir. 1976). But a recovery of money from individuals rather than the city is available. *See Muzquiz v. City of San Antonio*, 528 F.2d 499, 500 n. 5 (5th Cir. 1976) (en banc), *petition for cert. filed*, 44 U.S.L.W. 3727 (U.S. May 27, 1976). Although the issue of who is a "person" within § 1983 obviously is not the same as the issue of the scope of federal sovereign immunity, the *Muzquiz* distinction between money awards against governments and those against individual officers has the same effect in both situations. Whatever relief Davis's complaint would be construed as seeking if this were a § 1983 action involving a city, however, we construe it under the circumstances here as seeking damages against Representative Passman individually.

the federal context assumes constitutional stature under the speech or debate clause,[21] absolutely shields Representative Passman from any suit challenging a decision to dismiss an employee.[22]

The Supreme Court has decided a series of speech or debate cases but has not confronted the precise situation before us. The Court has held that members of Congress are immune from judicial inquiry into their votes, *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), their speeches on the floor of Congress, *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), their decisions to circulate information to other members of Congress, *Doe v. McMillan, supra*, their participation in committee investigations and proceedings, *Doe v. McMillan, supra; Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *cf. Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and their issuance of subpoenas pursuant to a legitimate committee investigation, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). Members of Congress are not immune, on the other hand, from judicial inquiry into their public distribution of materials gathered by committees, *Doe v. McMillan, supra; Gravel v. United States, supra*, or their acceptance of bribes in return for votes on pending legislative business, *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

21. The Constitution provides:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of the respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

U.S.Const. art. I § 6.

The freedom from arrest does not prohibit service of process, *see Gravel v. United States*, 408 U.S. 606, 614-15, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), and is inapplicable here.

While none of these cases involved the dismissal of a staff member, we think their language and rationale compel a rejection of Representative Passman's immunity defense. We begin with a statement of the defense's purpose:

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.

Powell v. McCormick, 395 U.S. 486, 505, 89 S.Ct. 1944, 1955, 23 L.Ed.2d 491 (1969).

One could argue on Representative Passman's behalf that calling him into court to defend *any* action, whether related to congressional business or to his personal contracts or torts, risks distracting him from "legislative tasks." Supreme Court decisions, however, make clear that the speech or debate clause does not prohibit all such distractions. Calling Senator Gravel into court to testify concerning his arrangements with Beacon Press to publish the "Pentagon Papers," which he had earlier read into the Congressional Record, might have distracted him from legislative business, but the Court said Gravel was nonetheless not exempt from the inquiry. *Gravel v. United States, supra*, 408 U.S. at 622, 92 S.Ct. 2614. *Gravel* and other opinions finding the legislative immunity cloak wanting in particular settings, *see United States v. Brewster, supra; Doe v. McMillan, supra*, 412 U.S. at 314-15, 93 S.Ct. 2018, conclusively establish that subjecting Representative Passman to a damages action

22. We view "legislative immunity," sometimes referred to as "congressional immunity," as coextensive in the federal context with speech or debate protection. The terms all refer to the absolute immunity that members of Congress (and sometimes their functionaries) possess for certain legislative acts. We use the phrase "official immunity" to describe more generally the varying levels of "good faith," "privilege" or "immunity" defenses that numerous government officials can assert.

does not, without more, contravene the speech or debate clause.

[18, 19] Rather than blanket immunity from burdensome litigation, the clause provides protection only against inquiries into legislative policy-formulation processes. Enacting legislation is the province of Congress and Congress alone. The speech or debate clause assures members of Congress that their actions in formulating and enacting legislation, from the committee stage through voting, will not be subjected to judicial (or executive) inquiry. But the immunized act must be intimately cognate to the legislative process. The reason for an absolute rather than qualified immunity is that the prospect of an unsuccessful but burdensome lawsuit might affect a legislator's performance of his or her legislative duties, thus distorting the democratic process. Because of our devotion to an unfettered representative government, we foreclose even well-founded lawsuits challenging the performance by members of Congress of their legislative roles.

The language of the Supreme Court's speech or debate decisions supports this view. *Tenney v. Brandhove, supra,* announced that legislators are protected when "acting in the sphere of legitimate *legislative* activity." 341 U.S. at 376, 71 S.Ct. at 788 (emphasis added).[23] More recent cases have elaborated on *Tenney's* oft-cited formula. In *Gravel v. United States, supra,* the Court said:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of *speech, debate, and deliberation* without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.

408 U.S. at 616, 92 S.Ct. at 2622 (emphasis added).[24] The Court said the clause's purpose was "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a *legislator,*" 408 U.S. at 618, 92 S.Ct. at 2623 (emphasis added), adding that the three earlier speech or debate cases, *Kilbourn, Dombrowski* and *Powell,*

> reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.

408 U.S. at 620, 92 S.Ct. at 2625. The Court reiterated that "the Clause has not been extended beyond the legislative sphere", and, of particular relevance here, the Court emphasized that the fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." 408 U.S. at 624–25, 92 S.Ct. at 2627. The *Gravel* Court continued:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States v. Doe,* 1st Cir., 455 F.2d 753 at 760.

408 U.S. at 625, 92 S.Ct. at 2627. The Court then stated its holding:

> "Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.

408 U.S. at 625, 92 S.Ct. at 2627.

A year later in *Doe v. McMillan, supra,* the Supreme Court reiterated the limited scope of the clause. In rejecting the argument that publication and distribution of a committee report was essential to the legislative process and therefore within the speech or debate clause, the Court said, "Our cases make perfectly apparent . . . that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." 412 U.S. at 313, 93 S.Ct. at 2025. The Court added, "'[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.'" 412 U.S. at 320, 93 S.Ct. at 2028, quoting *Tenney v. Brandhove, supra,* 341 U.S. at 377, 71 S.Ct. 783 (brackets in original). Finally, the Court said,

> The business of Congress is to legislate; Congressmen and aids are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' *Tenney v. Brandhove,* 341 U.S., at 376, 71 S.Ct. 783, they enjoy no special immunity from local laws . . . .

412 U.S. at 324, 93 S.Ct. at 2030.

These statements compel the conclusion that representatives are not immune from inquiry into their decisions to dismiss staff members. Such dismissal decisions certainly are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States, supra,* 408 U.S. at 625, 92 S.Ct. at 2627. Peripheral or tangential activities of a representative must not be confused with the legislative core. A representative's transgressions are not given absolute absolution. The Constitution establishes an immunity for aberrations in a representative's legislative activities, but members of Congress become mere mortals when they operate in more mundane fields. When members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered.[25]

23. We adopted the *Tenney* formula in *City of Safety Harbor v. Birchfield,* 529 F.2d 1251 (5th Cir. 1976).

24. This passage from *Gravel* was emphasized again in *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 503, 95 S.Ct. at 1821-22, 44 L.Ed.2d at 336. The issuance of subpoenas as part of a legitimate committee investigation was found to be an integral part of the process by which members participate in House proceedings with respect to the formulation and consideration of legislation; accordingly, speech or debate protection attached

25. One could argue on Representative Passman's behalf that, because high-ranking staff members may sometimes affect a legislator's performance of his or her deliberative role, dismissal decisions should be protected by the speech or debate clause. The justification for establishing absolute immunity would be that the fear of an unfounded but burdensome lawsuit might influence a decision whether to fire an assistant, thereby impermissibly affecting the legislative process.

We find, however, that such an argument cannot help Representative Passman. Our decision leaves members of Congress free to dismiss staff members for any reason or for no reason, so long as broad limits established by the Constitution are not exceeded. Representatives will be afforded a broad good faith defense, *see* page 881, *infra,* and will be subject to liability in only the most egregious cases. The very low likelihood of recovery in unfounded cases will make the number of filings low. Moreover, summary judgment procedures, if applied judiciously, will minimize any burden. The chance that a legislator's dismissal decision will be affected by the prospect of a burdensome but meritless suit is therefore remote. The prospect that a dismissal decision will in turn affect the legislative process is also extremely remote. These layered causation gaps defeat the argument for absolute immunity. By limiting representatives to qualified immunity we achieve the immunity doctrine's goals without needlessly sacrificing the availability of redress for clear constitutional violations.

Moreover, on this record we have no way of knowing whether Davis's position gave her a

Our decision today does no more than give effect to the Supreme Court's mandate in *Gravel*: "Legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." 408 U.S. at 615, 92 S.Ct. at 2622. If legislators are bound by the law they create, they are even more clearly bound by the United States Constitution. The very premise upon which the Constitution stands is the equality of all persons before the law. Exceptions to that premise must be limited, guarded, and sparingly employed. Davis is entitled to have her claim heard on the merits.

5. *Qualified Immunity*

The inapplicability of speech or debate protection does not foreclose Representative Passman from asserting the same qualified immunity available to other government officials. *See generally Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).[26] Although *Wood* and *Scheuer* were § 1983 actions, their reasoning is equally applicable to this action founded directly on the constitution. *Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand) (Lumbard, J., concurring).

[20, 21] The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity such as that recognized in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Speech or debate protection is coextensive with the need to afford members of Congress absolute immunity. Absolute immunity extends only to certain key governmental officials, and then only when they are governing. It extends to prosecutors when they are prosecuting, *Imbler v. Pachtman, supra*, to judges when they are judging, *see Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), and to legislators when they are legislating, *e. g., Kilburn v. Thompson, supra*. As indicated, however, legislators are not legislating when they dismiss staff members. For the same reasons that the speech or debate clause does not extend to staff dismissals, Representative Passman cannot invoke absolute immunity.

Qualified immunity is available "in varying scope," "the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes, supra*, 416 U.S. at 247-48, 94 S.Ct. at 1692. The legitimate interest in assuring members of Congress broad discretion in their staffing decisions and the importance of staffing decisions to a legislator's performance dictate that the scope of the Representative's qualified immunity is broad. In limiting the immunity to "good faith, non-malicious action," however, the Court in *Wood v. Strickland* made clear that a violation of constitutional rights could not be justified by "ignorance or disregard of settled, indisputable law". 420 U.S. at 321, 95 S.Ct. at 999-1000, 43 L.Ed.2d at 225.[27] In light of the settled, indisputable principle that federal government sex discriminations not supported by rational (or perhaps compelling) legitimate justifications are unconstitutional, *see, e. g., Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the likelihood that Representative Passman will be able successfully to maintain a good faith defense even under the liberal standard governing congressional staffing decisions appears very remote.[28] Because this case must be remanded for a trial at which Representative Passman will be free to press his claim that the dismissal was not based on Davis's gender, however, we need do no more at this stage than point out that any qualified immunity plea will be governed by the principles to which we have adverted. The determination that Representative Passman cannot claim absolute immunity is sufficient to require reversal of the dismissal given in his favor. *See, e. g., Scheuer v. Rhodes*, 416 U.S. 232, 239, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976).

meaningful input into the Representative's legislative decisionmaking. Even if speech or debate protection extended to decisions to dismiss high-ranking assistants, the clause would not sustain the Representative's 12(b)(6) motion here.

26. We use "qualified immunity" as synonymous with "good faith defense." *See* note 22 *supra*.

27. *Wood* involved school officials, but we have applied its principles more broadly. *See Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976). *See also Morris v. Travisono*, 528 F.2d 856 (1st Cir. 1976); *Mukmuk v. Commissioner of Dep't. of Correctional Services*, 529 F.2d 272 (2d Cir. 1976); *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976).

C. *Declaratory Relief*

The final form of relief that Davis seeks is declaratory. Although a claim for declaratory relief could be pursued independently of any right to other types of relief, *see Powell v. McCormack*, 395 U.S. 486, 518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), the absence of any forward-looking scope of operation for any declaration of Davis's rights as against Representative Passman, whose congressional tenure is virtually at its end, would make the propriety of such a declaration questionable.[29] This issue loses its significance, however, in view of our holding that a damages remedy is available. We therefore decline to pass on the propriety of declaratory relief.

III. Conclusion

In summary, taking the complaint's allegations as true, Representative Passman's dismissal of a staff member on the basis of gender violated the equal protection component of the fifth amendment due process clause. Under *Bivens* the Constitution itself affords the dismissed staff member a damages remedy. Sovereign immunity does not bar a damages award against the Representative individually. The speech or debate clause does not extend to staff dismissals because they are not "legislative tasks" within the Supreme Court's holdings. Finally, the existence of qualified immunity cannot support the district court's dismissal of the complaint.

REVERSED AND REMANDED.

JONES, Circuit Judge (dissenting):

It seems to me that the judges should refrain from wearing their robes in the halls of the Congress. The doctrine of separation of powers should, I believe, require the affirmance of the dismissal of the action.

WEST KEY NUMBER SYSTEM

28. The good faith defense must of course be distinguished from a defense denying that the firing was discriminatory. The former asserts that the firing was unconstitutional but that the Representative acted in good faith and therefore should not be held liable. The latter asserts that gender was not the basis of the dismissal and that the dismissal therefore was not unconstitutional. *Wood* makes a successful assertion of the former defense unlikely; *Wood* does not affect the latter defense.

29. Davis has not alleged a desire to work for other representatives whose employment decisions might be affected by the resolution of her constitutional claims.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

SHIRLEY DAVIS
PLAINTIFF

VERSUS CIVIL ACTION NO. 74-745

OTTO E. PASSMAN,
CONGRESSMAN OF THE UNITED STATES
DEFENDANT

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 26 1975
ALTON J. CURTIS, CLERK
By

JUDGMENT

THIS CAUSE CAME ON FOR HEARING before this Court on February 24, 1975, on the Motion to Dismiss under Rule 12(b) filed by defendant contending that plaintiff's complaint fails to state a claim against defendant upon which relief can be granted on three grounds, viz : (1) that the alleged conduct of defendant is not violative of the Fifth Amendment to the Constitution; (2) that the law affords no private right of action to plaintiff; and (3) by reason of the doctrines of sovereign and official immunity; and, the Court having considered the briefs of counsel for both sides, and having heard the oral arguments of counsel for both sides,

IT IS THE OPINION OF THIS COURT, that the complaint filed by plaintiff Shirley Davis herein does fail to state a claim against defendant Otto E. Passman, upon which relief can be granted, for the reason that the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution and for the reason that the law affords no private right of action to plaintiff therefor. The Court is of the opinion that the doctrines of sovereign and official immunity urged by defendant as grounds (3) for said motion are not well founded. Having found that defendant's Motion to Dismiss is well founded as to defendant's grounds (1) and (2),

JUDGMENT IS HEREBY ENTERED in favor of defendant Otto E. Passman, and against plaintiff Shirley Davis, dismissing the complaint of plaintiff for failure to state a claim against defendant Otto E. Passman upon which relief can be granted.

THIS JUDGMENT entered and signed in Shreveport, Louisiana, on this 26 day of February, 1975.

TOM STAGG
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM :

STEPHEN J. KATZ
KIDD AND KATZ, ATTORNEYS
709 Jackson Street
Monroe, Louisiana 71201
Attorneys for Plaintiff

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
MAY 17 1977
EDWARD W. WADSWORTH
Clerk

NO. 75-1691

SHIRLEY DAVIS,

Plaintiff-Appellant,

versus

OTTO E. PASSMAN, CONGRESSMAN
OF THE UNITED STATES,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the
Western District of Louisiana

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion January 3, 1977, 5 Cir., 197_____, _____F2d_____)

(May 17, 1977)

efore BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

THE COURT:

A member of the Court in active service having requested poll on the application for rehearing en banc and a majority of e judges in active service having voted in favor of granting a hearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court banc with oral argument on a date hereafter to be fixed. The erk will specify a briefing schedule for the filing of supple- ntal briefs.

APPENDIX E

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1977

No. 75-1691

D. C. No. CA-74745

SHIRLEY DAVIS,

Plaintiff-Appellant,

versus

OTTO E. PASSMAN, CONGRESSMAN
OF THE UNITED STATES,

Defendant-Appellee.

- - - - -

Appeal from the United States District Court for the
Western District of Louisiana

- - - - -

Before BROWN, Chief Judge, JONES, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendant-appellee's petition for rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion and judgment of the panel of this Court of January 3, 1977 is reversed; and that the judgment of the said District Court is hereby affirmed in part and vacated in part;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 18, 1978

JONES, Circuit Judge, concurring specially.

RONEY, Circuit Judge, concurring specially.

GOLDBERG, Circuit Judge, with whom, BROWN, Chief Judge, joins, dissenting.

ISSUED AS MANDATE: MAY 10 1978

FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

—*v.*—

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1978
CERTIORARI GRANTED OCTOBER 30, 1978

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

—v.—

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

A. *District Court*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 74-745

SHIRLEY DAVIS, PLAINTIFF

v.

OTTO E. PASSMAN, DEFENDANT

DATE	PROCEEDINGS
Aug. 7, 1974	Complaint filed.
Oct. 9, 1974	Motion to dismiss filed.
Feb. 26, 1975	Opinion and judgment filed.
Mar. 7, 1975	Plaintiff's notice of appeal filed.

B. *Court of Appeals*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1691

DATE	PROCEEDINGS
Apr. 9, 1975	Record certified to Court of Appeals.
Apr. 12, 1976	Oral argument before Chief Judge Brown and Judges Goldberg and Jones.

DATE	PROCEEDINGS
Jan. 3, 1977	Opinion of Court of Appeals by Judge Goldberg; dissenting opinion by Judge Jones.
Feb. 16, 1977	Petition of defendant/appellee for rehearing and rehearing en banc filed.
May 17, 1977	Order granting rehearing and rehearing en banc filed.
Sept. 26, 1977	Oral argument before Court of Appeals en banc.
Apr. 18, 1978	Opinion of Court of Appeals en banc by Judge Clark; special concurrences by Judges Jones and Roney; dissenting opinion by Judge Goldberg, joined by Chief Judge Brown.
Apr. 18, 1978	Judgment filed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action Number 74-745

SHIRLEY DAVIS, PLAINTIFF

versus

OTTO E. PASSMAN, Congressman of the United States,
DEFENDANT

COMPLANT—Filed August 7, 1974

I. *JURISDICTION*

1. This is a civil action seeking declaratory, injunctive and other legal and equitable relief to redress violations of plaintiff's rights under the United States Constitution and more particularly Fifth Amendment thereto. This Court has jurisdiction over the action pursuant to 28 U.S.C. Sections 1343, 1331, and 2201. The matter in controversy exceeds the value of $10,000.00.

II. *PARTIES*

2. Plaintiff, Shirley Davis, is an adult female citizen of the United States and a resident of the City of Monroe, Parish of Ouachita, State of Louisiana. Plaintiff was employed by defendant as his deputy administrative assistant from February 1, 1974, through July 31, 1974.

3. Defendant Otto E. Passman is a citizen of the United States with his domicile in the City of Monroe, Parish of Ouachita, State of Louisiana. He is the duly elected representative to the Congress of the United States from the Fifth District of Louisiana.

III. *STATEMENT*

4. Plaintiff was an employee of defendant in the capacity of deputy administrative assistant from Febru-

ary 1, 1974, through July 31, 1974, on which date her employment was terminated by defendant.

5. Plaintiff's salary was $18,000.00 per year with the expectation of a promotion to defendant's administrative assistant at a salary of $32,000.00 per year upon the imminent retirement of defendant's current administrative assistant.

6. On June 21, 1974, defendant mailed plaintiff a letter stating he would terminate her employment effective July 31, 1974, solely because she was a female and despite the fact that she was "able, energetic, and a very hard worker." A copy of said letter of June 21, 1974, is attached hereto and made a part hereof as Exhibit "A."

7. The conduct of defendant as described herein and as will be more fully shown on trial of this cause discriminated against plaintiff and continues to discriminate plaintiff on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto.

8. Plaintiff suffered and is suffering irreparable injury from defendant's practices, policies, and customs as set forth herein, and will continue to so suffer unless this Court grants the relief requested.

9. There is a real controversy between the parties and plaintiff has no completely adequate remedy at law; unless plaintiff's request for declaratory and injunctive relief is granted, she will suffer irreparable injury.

10. Plaintiff's dismissal has seriously injured her standing and reputation in the community in which she lives and works and plaintiff has been refused any opportunity to refute the ground of dismissal.

11. Plaintiff affirmatively states she is well capable of carrying on the position of administrative assistant and that her dismissal was predicated solely upon sex discrimination.

IV. *PRAYER FOR RELIEF*

WHEREFOR, plaintiff respectfully prays that this Court:

1. Declare the actions of defendant, Otto E. Passman, described in the paragraphs hereinabove to be unlawful

sex discrimination in violation of the United States Constitution and the Fifth Amendment thereto;

2. Issue preliminary and permanent injunctions enjoining defendant, Otto E. Passman, his agents, employees, and those acting in concert or cooperation with him, from engaging in policies and practices contrary to the rights of plaintiff which are sexually discriminating in violation of the United States Constitution and the Fifth Amendment thereto;

3. Issue preliminary and permanent injunctions requiring defendant, Otto E. Passman, to rehire plaintiff in the position she would currently hold were it not for the unlawful sexual discrimination.

4. Issue such other and further relief as may be proper and necessary, including, but not limited to, promotion, salary increase, and back pay to plaintiff;

5. Award plaintiff the costs of the action, together with reasonable attorney fees for the prosecution of this action.

Respectfully submitted,

Kidd & Katz
709 Jackson Avenue
Monroe, Louisiana

Attorneys for Plaintiff

By: /s/ Stephen J. Katz
STEPHEN J. KATZ

EXHIBIT "A"

OTTO E. PASSMAN
Congressman
5th District, Louisiana

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

June 21, 1974

Mrs. Shirley Davis
611 Eason Place
Monroe, Louisiana 71201

Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional

month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,

/s/ Otto E. Passman
OTTO E. PASSMAN
Member of Congress

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

[Title omitted in printing]

MOTION TO DISMISS UNDER RULE 12 (b)—
Filed October 9, 1974

NOW INTO COURT, through his undersigned counsel, comes defendant OTTO E. PASSMAN, who respectfully moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted, for the reason that the alleged conduct of defendant is not violative of the Fifth Amendment to the Constitution.

2. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted for the reason that the law affords no private right of action to plaintiff.

3. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted by reason of the sovereign immunity doctrine and the official immunity doctrine.

In accordance with the Court's rules, defendant attaches hereto a memorandum of authorities in support of this motion.

HUDSON, POTTS & BERNSTEIN
10th Floor
Ouachita National Bank
Building
Monroe, Louisiana 71201

By: /s/ Jesse D. McDonald
JESSE D. MCDONALD
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 74-745

SHIRLEY DAVIS, PLAINTIFF

versus

OTTO E. PASSMAN, CONGRESSMAN OF THE
UNITED STATES, DEFENDANT

JUDGMENT—February 26, 1975

THIS CAUSE CAME ON FOR HEARING before this Court on February 24, 1975, on the Motion to Dismiss under Rule 12(b) filed by defendant contending the plaintiff's complaint fails to state a claim against defendant upon which relief can be granted on three grounds, viz.: (1) that the alleged conduct of defendant is not violative of the Fifth Amendment to the Constitution; (2) that the law affords no private right of action to plaintiff; and (3) by reason of the doctrines of sovereign and official immunity; and, the Court having considered the briefs of counsel for both sides, and having heard the oral arguments of counsel for both sides.

IT IS THE OPINION OF THIS COURT, that the complaint filed by plaintiff Shirley Davis herein does fail to state a claim against defendant Otto E. Passman, upon which relief can be granted, for the reason that the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution and for the reason that the law affords no private right of action to plaintiff therefor. The Court is of the opinion that the doctrines of sovereign and official immunity urged by defendant as grounds (3) for said motion are not well founded. Having found that defendant's Motion to Dismiss is well founded as to defendant's grounds (1) and (2).

JUDGMENT IS HEREBY ENTERED in favor of defendant Otto E. Passman, and against plaintiff Shirley Davis, dismissing the complaint of plaintiff for failure to state a claim against defendant Otto E. Passman upon which relief can be granted.

THIS JUDGMENT entered and signed in Shreveport, Louisiana, on this 26th day of February, 1975.

/s/ Tom Stagg
TOM STAGG
United States District Judge

Approved as to form:

/s/ Stephen J. Katz
STEPHEN J. KATZ
KIDD AND KATZ
Attorneys
709 Jackson Street
Monroe, Louisiana 71201
Attorneys for Plaintiff

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1691

SHIRLEY DAVIS, PLAINTIFF-APPELLANT

v.

OTTO E. PASSMAN, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

OPINION—January 3, 1977

Before BROWN, Chief Judge, and JONES and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

In this case a member of the United States Congress unflinchingly asserts that the Constitution allows him openly to discriminate against women. He asserts further that he need not so much as suggest a single basis for the discrimination. The issue is not to be trivialized. We have here a conflict of transcendental importance between the rights of the individual and the rights of a representative qua representative. Although representatives admittedly have some insulation not wrapped around ordinary mortals, the conflicting interests must be harmonized, not dichotomized. Finding that our Constitution protects individual rights even against the mighty, we remand this case for trial.

In the early part of 1974 Shirley Davis was Deputy Administrative Assistant to Representative Otto E. Pass-

man of the Louisiana Fifth Congressional District. The Representative terminated Davis's employment effective July 31, 1974. In his letter to her explaining the termination decision the Representative wrote, "You are able, energetic and a very hard worker. . . . [H]owever, on account of the unusually heavy workload in my Washington office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant be a man." The full text of this rather remarkable letter is set out in the margin.[1]

---

[1] Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,

/s/ Otto E. Passman
Member of Congress

Davis then filed this action against the Representative, claiming he had violated the equal protection component of the fifth amendment's due process clause. She invoked the court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331(a), and she sought specific relief, damages and declaratory relief.

The Representative moved to dismiss the complaint on three grounds: that his conduct was not unconstitutional, that the law afforded Davis no private right of action, and that the doctrines of sovereign and official immunity barred the action. The district court rejected the immunity argument but dismissed the action on the first two points. We reverse, finding that Davis's allegations, if proved, will establish a constitutional violation for which she has a private right of action. We agree with the district court that the immunity doctrines do not bar the suit.

I. Constitutionality

[1, 2] Although the fourteenth amendment's equal protection clause applies only to the states, the fifth amendment's due process clause contains an equal protection component applicable to the federal government. *See, e.g., Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *N. L. R. B.* v. *Sumpter Plywood Corp.*, 535 F.2d 917, 930 n.22 (5th Cir. 1976). Moreover, recent Supreme Court decisions establish beyond dispute that, just as sex discrimination by the states violates the fourteenth amendment unless supported by sufficient justifications, *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), sex discrimination by the federal government violates the fifth amendment. *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). We must therefore address two questions: whether the alleged conduct constituted sex discrimination, and if so whether sufficient governmental interests validate the discrimination.

A. *Discrimination*

[3] In the case at bar the first question is easily answered. Davis's allegations, which must of course be taken as true in evaluating the Representative's motion to dismiss, *see, e.g., Radovich* v. *National Football League*, 352 U.S. 445, 448, 77 S.Ct. 390, 1 L.Ed.2d 456 (1956); *Reeves* v. *City of Jackson, Mississippi*, 532 F.2d 491, 493 (5th Cir. 1976), clearly make out a case of sex discrimination. The Representative's termination letter offered but a single reason for Davis's dismissal: she was a woman; the job called for a man.

The Representative argues, however, that unconstitutional sex discrimination occurs only when the sex-based classification is embodied in a statute and only when the actor is someone other than a member of Congress. With respect to the first point he correctly notes that the statute upon which his dismissal of Davis was predicated, 2 U.S.C. § 92, is nondiscriminatory on its face; it allows dismissal of both male and female staff members with or without cause. The Representative also correctly notes that neither *Frontiero* nor *Wiesenfeld* compel rejection of his position; both of those cased invalidated *statutory* classifications.[2]

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[2] *Frontiero* confronted a statutory scheme dealing with benefits afforded members of the uniformed services for their "dependent" spouses. A serviceman could claim his wife as a dependent without regard to actual dependency, whereas a servicewoman could claim her husband only if he was shown to be dependent upon her for over one-half of his support. The court invalidated the scheme. Similarly, *Wiesenfeld* struck down a provision of the Social Security Act that granted a widow, but not a widower, benefits based on the deceased spouse's earnings.

Supreme Court decisions invalidating state sex discriminations have also involved statutes. *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) held unconstitutional an Idaho statute under which male candidates to administer an estate were preferred over equally-qualified female candidates. *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) struck down a Utah statute that established a greater age of majority for males than for females.

[4] The Representative's argument that equal protection principles apply only to statutory discrimination, however, contravenes a long and unbroken chain of decisions. The Supreme Court clearly rejected the argument as long ago as 1886. In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) the Court held that the discriminatory application against Chinese Americans of facially neutral building regulations violated the equal protection clause. The passage of time has enhanced, not diminished, the position of *Yick Wo* as a pillar of our jurisprudence. Numerous more recent decisions have struck down nonstatutory discriminations, usually without even pausing to note explicitly that equal protection principles are not limited to statutes. *See, e.g., Keyes* v. *School District No. 1*, 413 U.S. 189, 201, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Foster* v. *Sparks*, 506 F.2d 805 (5th Cir. 1975); *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974); *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).

Equal protection scrutiny of inconsistencies in the application of facially nondiscriminatory statutes is not, of course, without limits. In *Snowden* v. *Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed.2d 497 (1944) a state elections official refused to follow a state law requiring that a successful primary candidate be certified for inclusion on the general election ballot. The Court rejected the candidate's argument that this isolated failure to apply the state law to everyone equally constituted a denial of "equal protection of the laws." The Court laid down the governing standard:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who [were] entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Snowden v. *Hughes*, *supra*, 321 U.S. at 8, 64 S.Ct. at 401.

Davis's complaint clearly meets the *Snowden* requirements. The only digressions from neutral statutory pro-

visions that *Snowden* exempts from equal protection scrutiny are those isolated incidents not based on a *classification.*[3] Here, Representative Passman established a classification; he divided potential deputy administrative assistants into one group of men and another of women. The termination letter, at least on its face, is an open declaration of "intentional" and "purposeful" sex discrimination.

Therefore, Representative Passman will be free at trial to demonstrate that the firing was not in fact based upon Davis's gender, but he can derive no support from the nonstatutory nature of the discrimination. The constitutional guarantee of freedom from invidious discrimination would ring hollow indeed if it could be bypassed by the simple expedient of implementing the discrimination under a facially neutral statute. That the alleged discrimination was not embodied in a statute is of no moment.[4]

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[3] *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) supports this analysis. There the Supreme Court upheld the District of Columbia Metropolitan Police Department's use of Test 21 to screen applicants. The test allegedly excluded a disproportionate number of black applicants and would therefore have been invalid under Title VII and *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). But the action had been brought before Title VII was made applicable to the federal government in 1972, and the Constitution itself provided the governing standard. See 426 U.S. at 238, n. 10, 96 S.Ct. 2040.

Unlike the situation in *Snowden,* the challenged action in *Washington* did reflect a classification; applicants were separated into one group that passed the test and another that did not. Equal protection scrutiny was therefore appropriate. Because the Court found no racially discriminating purpose, an issue as to which racially disproportionate impact was relevant but not dispositive, it did not invoke the stringent equal protection scrutiny that attends racial classifications. The Court upheld the challenged classification, finding it sufficiently related to the legitimate goal of modestly upgrading the communicative abilities of government employees. 426 U.S. at 245-246, 96 S.Ct. at 2050, 48 L.Ed.2d at 610.

[4] Although *Yick Wo* and the other cited decisions were decided under the fourteenth amendment, the equal protection component of fifth amendment due process contains the same principle. There is no reason to exempt the federal government from the principle that

[5, 6] Representative Passman's contention that the constitutional ban on unjustified sex discrimination does not restrict the actions of members of Congress is equally untenable. He argues, in effect, that his congressional status endows him with an open-ended right to discriminate irrespective of the time, place and condition of the discrimination.[5] A representative, however, is as subject to constitutional standards when hiring employees as when acting in concert with other members of Congress to enact legislation. A representative is not an imperator and is never above and beyond the law; any other view could not be squared with the whole predicate upon which our constitutional life depends. The need for wide discretion in staff employment decisions cannot be ignored, but the constitutional proscription of blatant sex discrimination does not impair Representative Passman's legitimate control over his staff to any extent at all. The Constitution does not force him to hire by the slide rule, but at the same time it does not permit him to slide into unbridled discrimination. The geometry of congressional discretion in hiring and firing is neither apogean nor perigean. We must equilibrate. Representative Passman can certainly assemble a capable and competent staff without engaging in the sex discrimination alleged here. The applicable constitutional standards may give a representative greater leeway in employment decisions than other government entities possess, and at trial Representative Passman may be able to show that he has not transgressed the constitutional requirements. All we need decide for purposes of this appeal, however, is that at some point invidious discrimination by a rep-

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discriminatory applications of nondiscriminatory statutes must meet equal protection guidelines, as *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) implicitly recognized. *See* note 3 *supra.*

[5] Whether the courts can redress a representative's transgressions of the constitutional standards presents a separate issue. Representative Passman asserts not only that he is immune from suit, but also that even apart from the possibility of redress, the Constitution does not prohibit him from discriminating on the basis of gender.

resentative in his or her employment decisions is unconstitutional. Davis's allegations are certainly sufficient to entitle her to go to trial in an effort to show that this is such a case.[6]

B. *Justification*

The next issue is whether the alleged discrimination is constitutional because supported by sufficient governmental interests. Whether the interests supporting a sex discrimination must be "compelling" is unsettled. In *Frontiero* four justices said sex was a "suspect classification" calling for strict judicial scrutiny. *See* 411 U.S. at 682-88, 93 S.Ct. 1764 (plurality opinion by Brennan, J.). Under that approach the government must show a compelling interest. Three justices, however, reserved the "strict scrutiny" issue saying the classification there was unconstitutional in any event. 411 U.S. at 691-92, 93 S.Ct. 1764 (Powell, J., concurring). The earlier case of *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and the subsequent cases of *Weinberger* v. *Wisenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) and *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), invalidated sex discriminations without addressing the strict scrutiny issue.[7] In

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[6] To eliminate any confusion we note that appellant need not demonstrate the denial of any "property" interest. Although the due process clause extends only to deprivations of "life, liberty, or property", a violation of the clause's equal protection component is necessarily a deprivation of "liberty". Therefore, decisions under the due process clause's equal protection component, like substantive due process decisions, make no reference to the "life, liberty, or property" requirement. *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975).

[7] The holdings of *Reed*, *Wiesenfeld* and *Stanton* are outlined in note 2 *supra*. *See also Kahn* v. *Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (Florida statute giving widows but not widowers a $500 property tax exemption upheld as substantially related to the legitimate object of cushioning the disproportionate financial difficulties confronting a lone woman); *Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (different tenure provisions for military men and women sustained because, under unchallenged scheme restricting the military role of women, service men and women are not similarly situated).

these decisions the Court clearly applied more than the minimal rationality test that characterizes equal protection decisions in some other areas, however, and sex-based classifications must withstand at least middle-level equal protection scrutiny.[8]

In the case at bar we can follow the Supreme Court's lead and refrain from specifying the applicable standard. Indeed, we need not even apply the substantial scrutiny that has characterized the Court's decisions. For here Representative Passman offers no governmental interest at all in support of the sex-based classification, and we can imagine none.[9] The qualifications for the post of deputy administrative assistant simply have nothing to do with gender. The Representative's suggestion in his letter that the job requires a man because of the "unusually heavy work load" and the "diversity of the job" is patently ridiculous. Understandably, the Representative has abandoned that rationale on this appeal. The Representative will be free at trial to pursue his contention that gender was not the basis of Davis's dismissal, but if he is unsuccessful the firing cannot escape constitutional condemnation.

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[8] For discussion of intermediate equal protection standards, see *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 98-110, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting); *Vlandis* v. *Kline*, 412 U.S. 441, 458-59, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973) (White, J., concurring); Gunther, The Supreme Court. 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L.Rev. 1 (1972).

[9] We therefore need not decide whether we would consider justifications occurring to us but not asserted by the Representative. The extent to which equal protection courts will consider supporting interests not put forward by the government is unsettled and may vary with the governing equal protection standard.

II. Availability of Relief

Having determined that Davis has alleged a constitutional violation, we must now determine whether the claim is one upon which relief can be granted. In substance, Davis seeks three forms of relief: specific relief, damages, and a declaration. We deal with each in turn.

A. *Specific Relief*

The specific relief Davis seeks includes reinstatement, promotion and an injunction against unlawful discrimination directed toward her. The injunction claim might raise a sovereign immunity issue under our decisions in *Blaze* v. *Moon*, 440 F.2d 1348 (5th Cir. 1971) and *Beale* v. *Blount*, 461 F.2d 1133 (5th Cir. 1973), even though the Supreme Court has said in *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) and *Dugan* v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) that sovereign immunity does not bar suits against federal officials alleging that they acted unconstitutionally. *See Penn* v. *Schlesinger*, 490 F.2d 700, 703-04 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed. 2d 385 (1976). In addition, the reinstatement and promotion prayers, while impervious to sovereign immunity attack because in the nature of mandamus, *see Penn* v. *Schlesinger*, *supra*; *Beale* v. *Blount*, *supra*, would raise difficult issues concerning the proper exercise of equitable remedial discretion. In *Abbott* v. *Thetford*, 534 F.2d 1101 (5th Cir. 1976) (en banc) we refused to order a judge to reinstate his chief probation officer because the probation officer's personal criticisms of the judge made the necessary cooperative and confidential relationship impossible.[10] Although Davis has not, so far as this record shows, done anything to antagonize the Representative other than bring this lawsuit to vindicate her constitutional rights, we would remain very hesitant to order

[10] In *Abbott* the en banc court adopted Judge Gewin's dissent from the panel opinion, *see* 529 F.2d 695, 701-08 (5th Cir. 1976).

reinstatement of a representative's personal assistant. *Cf. Lumley* v. *Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

Intervening events, however, have blunted the importance of these issues. We take notice that Representative Passman was defeated in the 1976 primary election. His tenure in Congress will therefore apparently come to an end on January 3, 1977. That the term is not yet completely over saves the specific-relief claims from technical mootness, but they have certainly lost their significance. We assume Davis will not press her reinstatement or injunction prayers, and we pass on to other remedies.

B. *Damages*

Davis's damages claim takes us through a five-stage analysis. First, damages are available under the Supreme Court's decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Second, the Supreme Court's more recent decision in *Brown* v. *General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) does not affect the *Bivens* remedy under the circumstances here. Third, sovereign immunity does not bar Davis's claim for damages against Representative Passman individually. Fourth, the speech or debate clause does not shield the Representative. Fifth, although the Representative can assert qualified official immunity at trial, that doctrine is insufficient to support a motion to dismiss. In sum, Davis's damages claim must be remanded for trial.

1. *Bivens*

[7] Davis's claim for damages is predicated upon *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*. There the Supreme Court held that a damages remedy for an unconstitutional search and seizure could be implied directly from the Constitution itself. The Court rejected the government's argument that the complainant should have been relegated

to a state law tort action and that the Constitution's sole function was to limit the scope of the officers' privilege defense, holding that the constitutional damages action was independent of state tort law. The Court explicitly rejected the government's argument that damages should be available only if "necessary to enforce the Fourth Amendment." 403 U.S. at 397, 91 S.Ct. at 2005. Among other things, the Constitution is a compendium of rights, and their enforcement does not depend upon statutory enrollment. As *Bivens* establishes, legislative inaction does not vitiate constitutional rights. Statutory actions may give breath to constitutional rights, but congressional inaction cannot suffocate them.

[8] Although Davis's claim arises under the fifth amendment, not the fourth, we find no basis in *Bivens*' language or rationale for according any significance to this distinction. The rights protected by the fifth amendment due process clause are every bit as fundamental as fourth amendment rights. Here, as in *Bivens*, damages simply constitute "a particular remedial mechanism normally available in the federal courts," 403 U.S. at 397, 91 S.Ct. at 2005.

Indeed, here the case for implying a damages remedy is even stronger than in *Bivens*. In the *Bivens* situation state tort law is available to remedy some constitutional violations, and the exclusionary rule also sometimes provides a remedy. The case for implying a constitutional damages remedy becomes more compelling when, as here, there is no meaningful alternative remedy. Mr. Chief Justice Marshall's time-honored call for justice provides a guiding principle not lightly to be ignored: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), quoted in *Bivens, supra*, 403 U.S. at 397, 91 S.Ct. [1999] at 2005.

Our conclusion that *Bivens* is not limited to fourth amendment claims draws support from various court of appeals decisions. We have ourselves upheld an arrested person's complaint seeking damages directly under the

Constitution for the denial of proper medical care. We said that the conduct might have violated the fourteenth amendment's due process clause or the eighth amendment, and that the complaint stated a damages claim. *See Reeves* v. *City of Jackson, Mississippi*, 532 F.2d 491, 495 (5th Cir. 1976). *See also Roane* v. *Callisburg Independent School District*, 511 F.2d 633 (5th Cir. 1975) (Fourteenth amendment due process). Other circuits that have decided the issue are in accord. *See Brault* v. *Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975) (damages action for fourteenth amendment due process violation "comes within *Bivens*' sweeping approbation of constitutionally-based causes of action");[11] *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (fifth amendment due process);[12] *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974), (fifth amendment due process).[13] In extending *Bivens* to fifth amendment due process claims, *States Marine* used language squarely applicable in our case:

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[11] *Brault* addressed the complicating issue, not present in our case, of whether the exclusion of cities from the definition of "person" in 42 U.S.C. § 1983 affected the existence of the *Bivens* cause of action. *See generally* Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv.L.Rev. 922 (1976). *Brault* upheld the constitutional action despite § 1983. We reached the same result in *Roane* v. *Callisburg Independent School Di rict, supra* and *Reeves* v. *City of Jackson, Mississippi, supra. See also Cox* v. *Stanton*, 529 F.2d 47 (4th Cir. 1975); *Fine* v. *City of New York*, 529 F.2d 70, 77 (2d Cir. 1975) (Smith, J., concurring and dissenting). *Cf. Rotolo* v. *Borough of Charleroi*, 532 F.2d 920 (3rd Cir. 1976); *Amen* v. *City of Dearborn*, 532 F.2d 554 (6th Cir. 1976).

[12] *Moore* extended *Bethea* v. *Reid*, 445 F.2d 1163 (3rd Cir. 1971), *cert. denied* 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (1972) (fourth and fifth amendments).

[13] In addition to the Second, Third and Fourth Circuit holdings cited in text, the Tenth Circuit has intimated that *Bivens* extends beyond the fourth amendment. *See Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926 (10th Cir. 1975). The issue is open in the D.C. Circuit. *See Lewis* v. *D.C. Dep't. of Corrections*, 174 U.S.App. D.C. 483, 533 F.2d 710 (1976). Although the district courts have split, the best reasoned opinions have reached our result. *See, e.g., Penzarella* v. *Boyle*, 406 F.Supp. 787 (D.R.I. 1975).

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.

498 F.2d at 1157.

[9] Finally, we note that measuring damages presents no insuperable problem. Representative Passman was free, within constitutional limits, to dismiss Davis at any time. But if the actual dismissal is found at trial to have been unconstitutional, then lost salary should be taken into account in assessing damages. The situation is analogous to a substantively justified dismissal accomplished in a procedurally unconstitutional way. That a defendant could have dismissed an employee without violating the Constitution has never been thought to preclude the award of damages for a dismissal that was in actuality unconstitutional. *Cf. Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365 n.18, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

2. *Brown*

[10] Our conclusion, then, is that *Bivens* gives Davis a damages remedy for Representative Passman's deprivation of her due process rights. We pause briefly, however, to reject the notion that sweeping language in a recent Supreme Court decision dictates a contrary result. In *Brown* v. *General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) the Court held that the 30-day limitation on bringing Title VII employment discrimination suits against the federal government could not be avoided by the simple expedient of bringing the action directly under the Constitution. The *Brown* holding is inapplicable here because Davis never

had a Title VII action. Title VII excludes members of congressional staffs from its protection.[14]

The inapplicability of the *Brown* holding does not, however, answer the contention that some of its language seems on casual examination to preclude Davis's constitutionally based claim. The issue arises from Mr. Justice Stewart's framing of the *Brown* issue:

> The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment.

425 U.S. at 821, 96 S.Ct. at 1963, 48 L.Ed.2d at 405. Taken for all it might be worth, this language would deny Davis not only a damages remedy but any remedy whatesoever.

We refuse to accord the language such broad scope. In the first place, a moment's reflection indicates the incongruity of importing Mr. Justice Stewart's language into our case. It simply makes no sense to speak of an "exclusive judicial remedy" when there is no remedy at all. *Brown* establishes that Title VII is the exclusive judicial remedy for federal employment discrimination to which Title VII extends, but in areas not touched by Title VII other remedies are not affected.

This is conclusively established by *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), decided the very same day as *Brown*. In *Mow Sun Wong* the Court invalidated the Civil Service Commission's rule excluding aliens from most federal employment.[15] Title VII does not prohibit discrimination

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[14] 42 U.S.C. § 2000e-16(a) makes the federal government employment discrimination provisions inapplicable to legislative branch positions not in the competitive service, and congressional staffs are not in the competitive service.

[15] The *Mow Sun Wong* plaintiffs challenged the commission's rule under the fifth amendment's equal protection principle. The Court noted that overriding national interests might conceivably provide a justification for a citizenship requirement in the federal service. Without resolving that issue, the Court held that due process required that there be a legitimate basis for presuming that the rule

against aliens, *see Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), just as Title VII does not prohibit sex discrimination against congressional staff members. In *Mow Sun Wong* the Supreme Court thus accorded a non-Title VII judicial remedy for a claim of federal employment discrimination. By its action on the very same day *Brown* was decided, the Court made clear that the "exclusive remedy" language applies only to employment discrimination covered by Title VII.[16]

[11] We need not, however, rely solely on *Mow Sun Wong*. The whole structure of the Court's argument in *Brown* has no relevance to discriminations not within Title VII's domain. The Court first argued that when Congress extended Title VII to federal employment in 1972 it believed, rightly or wrongly, that no other remedy existed. From this the Court deducted that Congress fashioned a remedy believed adequate standing alone to cure the discriminatory ills being brought within the ambit of Title VII. But Congress's belief that no remedy existed, coupled with its failure to enact any remedy, scarcely demonstrates a belief that no remedy was needed for discrimination left outside Title VII. For, as is well established, Congress need not address all facets of a problem in a single piece of legislation; it is free to enact remedial legislation element by element at a pace most acceptable to the legislative mind. *See, e.g., Railway Express Agency* v. *New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949).

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was actually intended to serve the asserted national interest. Because the rule had been adopted by the Civil Service Commission, whose only concern was the promotion of an efficient federal service, the Court found no basis for assuming that it was in fact intended to further any overriding national interests. Accordingly, the Court invalidated the rule, at least pending presidential or congressional approval of its policy.

[16] *Mow Sun Wong* was not a damages case and does not preclude *Brown* from being read to make Title VII the exclusive *damages* remedy for claims of federal employment discrimination. *Mow Sun Wong* does conclusively establish, however, that the Court's broad language in *Brown* is subject to qualifications, and for the reasons developed herein we see no reason to strain to make *Brown*'s language applicable to our case.

The *Brown* Court's second line of argument is equally inapplicable to discriminations outside Title VII. It reasoned that

> [t]he balance, completeness and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief.

425 U.S. at 832, 96 S.Ct. at 1968, 48 L.Ed.2d at 411. The Court was certainly correct that the "balance, completeness and structural integrity" of the statute would be undermined if its 30-day limitations period could be rendered meaningless by bringing an action on some other basis. The "structural integrity" of the statutory prerequisites to invoking Title VII cannot be undermined, however, by the provision of a remedy for conduct not governed by Title VII. Our decision leaves Title VII fully operative within its sphere.

In addition, we note another obstacle preventing *Brown* from affecting our case. The *Bivens* remedy is based on the Constitution itself. We remain ever willing to defer to congressional views, but we cannot do so at the expense of constitutional principles. Nothing in *Bivens* suggests Congress could repeal the damages remedy without enacting a suitable alternative. The Court did say, in rejecting defendants' argument that the issue was whether the damages remedy was "necessary" to enforce the fourth amendment, that "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." 403 U.S. at 397, 91 S.Ct. at 2005. The case at bar is no different in this respect than *Bivens*. The 1972 additions to Title VII cannot be said to constitute an "explicit" congressional disapproval of the damages remedy, and more fundamentally there is not "another remedy, equally effective in the view of Congress," to which Davis has been remitted. Moreover, even if we somehow ignored these plain truths, the *Bivens*

passage would simply mean that the relevant inquiry would be whether a damages remedy is "necessary" to enforce the fifth amendment due process clause. Under this framing of the issue, at least until an alternative remedy were made available, Davis would still prevail. Congress is free to enact an adequate substitute remedy; to that extent the *Bivens* remedy therefore constitutes constitutional common law. *See* Monaghan, The Supreme Court, 1974 Term—Forword: Constitutional Common Law, 89 Harv.L.Rev. 1, 23-24 (1975). Congress has not done so, however, and the constitutionally-based *Bivens* damages remedy is available to Davis here.

When we deal, as we do here, with centrifugal and centripetal forces in operation, we, as judges, must come to a stasis, but in arriving there we do not draw the lifeblood from the legislative process nor skeletonize the constitutional rights with which every citizen is endowed even when dealing with Congress. The exemption of Congress from Title VII does not have a cosmic cover. Title VII among other things implements constitutional rights, but here an open declaration of non-implementation because of the exemption accorded Congress does not import into our case the exclusivity of Title VII actions. When the statute affords relief from a constitutional invasion, the statutory methodology should be followed, but when the statute does not attempt to implement the constitutional rights sought to be vindicaed, we cannot then use the statute as the sword to demean or to eliminate the constitutional right. The constitutional right stands on its own words without the necessity of Title VII's supporting procedures. Title VII's exemptions cannot build a haven for constitutional transgressors.

[12] One last issue regarding *Brown*'s effect on the *Bivens* cause of action remains to be canvassed. Congress could attempt to remove the federal courts' *jurisdiction* to hear such claims. Jurisdiction here is predicated upon 28 U.S.C. § 1331(a), as it was in *Bivens*. The amount in controversy exceeds $10,000. Any argument that in expanding Title VII in 1972 Congress excepted constitutionally-based federal employment discrimination claims from § 1331 must be rejected out of hand.

Congress did not speak in jurisdictional terms, nor did the Court in *Brown* v. *General Services Administration*, *supra*, when it employed the "exclusive judicidal remedy" language. In *Hampton* v. *Mow Sun Wong*, *supra*, the Court exercised § 1331 jurisdiction over a constitutional challenge to federal employment discrimination, indicating that the Court did not read Title VII's provisions as taking such claims out of § 1331.[17] We hold that the district court has jurisdiction to adjudicate Davis's *Bivens* action on its merits. The damages remedy is available.[18]

3. *Sovereign Immunity*

After carefully reviewing a variety of sovereign immunity decisions we are perhaps to be excused for con-

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[17] Moreover, any denial of jurisdiction to hear Davis's claim would itself raise grave constitutional issues. Congress can limit the federal courts' jurisdiction to afford one remedy when minimally adequate alternative remedies are available, *see, e.g., Yakus* v. *United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Lockerty* v. *Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943), but our entire constitutional structure and the great esteem we accord individual rights dictate the conclusion that Congress cannot foreclose the last avenue of redress for a constitutional deprivation. *See generally*, P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 330 60 (2nd Ed. 1973) (the "Dialogue"). In the usual situation Congress may have plenary authority to remove the federal courts' jurisdiction because the state courts, having general jurisdiction, remain open to redress constitutional wrongs. The authority of state courts to render relief against a United States Representative under the circumstances here, however, is subject to doubt. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397, 20 L.Ed. 597 (1872). In the absence of any indication that Congress intended the Title VII amendments to cut back on § 1331, we will not attribute to them a meaning of such doubtful constitutionality. *Cf. Johnson* v. *Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); *Weinberger* v. *Salfi*, 422 U.S. 749, 761, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975); *Gallo* v. *Mathews*, 538 F.2d 1148 (5th Cir. 1976).

[18] Indeed, at oral argument the Representative's attorney apparently conceded that *Bivens* controls:

> Your honor, I acknowledge to the court that if this court should find that there is a federally constituted right then Bivens versus the seven narcotics folks does imply a right of action.

cluding that the doctrine's primary effect has been to inject confusion into lawsuits involving the government and its agents. In the case at bar, however, the district court was not misled. It properly rejected the sovereign immunity plea.

[13] At this point we address the applicability of sovereign immunity only to damages actions. When, as here, an action seeks to impose liability upon a government official in an individual capacity, sovereign immunity poses no bar. Although sovereign immunity sometimes shields the United States Treasury from a plaintiff's claims, it does not protect the personal checkbook of an individual government official to any extent at all.

Representative Passman does not contest these principles, nor could he in light of the myriad cases inconsistent with any other view of sovereign immunity. For example, *Bivens* itself would have been barred if actions against government officials individually came within the sovereign immunity doctrine.

[14, 15] The contention Representative Passman does make is that this action is really an attempt to recover against the United States Treasury. Admittedly, Davis's complaint is not free of ambiguity. She did use the phrase "back pay" in her relief prayer, and we could conceivably construe "back pay" as limited to salary from the government rather than damages from Representative Passman individually. Her claim would then contravene *Penn* v. *Schlesinger*, 490 F.2d 700 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976) where we held sovereign immunity a bar to two forms of money relief "both of which would impinge upon the Treasury." 490 F.2d at 705. We refuse, however, to give the complaint such a niggardly, technical construction. Davis's position in this court makes clear that she seeks damages from the Representative individually, not merely government-paid salary. Moreover, a reading of the complaint as a whole accords with this view. She alleged other items of damages

besides lost salary, including injury to reputation,[19] and in addition to "back pay" her relief prayer sought "such other and further relief as may be proper." The named defendant was, of course, Representative Passman, not the United States of America. To read Davis's complaint as not seeking damages against Representative Passman individually would require a return to the technicalities of the common law writ system. The Federal Rules of Civil Procedure countenance no such result. Sovereign immunity does not bar Davis's claim.[20]

4. *Speech or Debate*

[16, 17] We turn now to whether the doctrine of legislative immunity, which in the federal context assumes constitutional stature under the speech or debate clause,[21] absolutely shields Representative Passman from

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[19] Davis can of course recover lost salary in addition to these other items of damages; we advert to the other items to illustrate that Davis did not use "back pay" in any restricted sense meaning government-paid salary only.

[20] A somewhat related line of cases in this circuit deals with whether a city employee can recover money when unconstitutionally discharged. Because a city is not a "person" within 42 U.S.C. § 1983, that statute does not authorize a "back pay" award that would run against the city, even if the nominal defendants are city officials. *Thurston* v. *Dekle*, 531 F.2d 1264, 1269 (5th Cir. 1976). But a recovery of money from individuals rather than the city is available. *See Muzquiz* v. *City of San Antonio*, 528 F.2d 499, 500 n. 5 (5th Cir. 1976) (en banc), *petition for cert. filed*, 44 U.S.L.W. 3727 (U.S. May 27, 1976). Although the issue of who is a "person" within § 1983 obviously is not the same as the issue of the scope of federal sovereign immunity, the *Muzquiz* distinction between money awards against governments and those against individual officers has the same effect in both situations. Whatever relief Davis's complaint would be construed as seeking if this were a § 1983 action involving a city, however, we construe it under the circumstances here as seeking damages against Representative Passman individually.

[21] The Constitution provides:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of the respective Houses, and in going to and returning from the

any suit challenging a decision to dismiss an employee.[22]

The Supreme Court has decided a series of speech or debate cases but has not confronted the precise situation before us. The Court has held that members of Congress are immune from judicial inquiry into their votes, *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Doe* v. *McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), their speeches on the floor of Congress, *United States* v. *Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), their decisions to circulate information to other members of Congress, *Doe* v. *McMillan*, *supra*, their participation in committee investigations and proceedings, *Doe* v. *McMillan*, *supra*; *Gravel* v. *United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *Dombrowski* v. *Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *cf. Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and their issuance of subpoenas pursuant to a legitimate committee investigation, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). Members of Congress are not immune, on the other hand, from judicial inquiry into their public distribution of materials gathered by committees, *Doe* v. *McMillan*, *supra*; *Gravel* v. *United States*, *supra*, or their acceptance of bribes in return for votes on pending legislative business, *United States* v. *Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

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same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

U.S. Const. art. 1 § 6.

The freedom from arrest does not prohibit service of process, *see Gravel* v. *United States*, 408 U.S. 606, 614-15, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), and is inapplicable here.

[22] We view "legislative immunity," sometimes referred to as "congressional immunity," as coextensive in the federal context with speech or debate protection. The terms all refer to the absolute immunity that members of Congress (and sometimes their functionaries) possess for certain legislative acts. We use the phrase "official immunity" to describe more generally the varying levels of "good faith," "privilege" or "immunity" defenses that numerous government officials can assert.

While none of these cases involved the dismissal of a staff member, we think their language and rationale compel a rejection of Representative Passman's immunity defense. We begin with a statement of the defense's purpose:

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.

Powell v. *McCormick*, 395 U.S. 486, 505, 89 S.Ct. 1944, 1955, 23 L.Ed.2d 491 (1969).

One could argue on Representative Passman's behalf that calling him into court to defend *any* action, whether related to congressional business or to his personal contracts or torts, risks distracting him from "legislative tasks." Supreme Court decisions, however, make clear that the speech or debate clause does not prohibit all such distractions. Calling Senator Gravel into court to testify concerning his arrangements with Beacon Press to publish the "Pentagon Papers," which he had earlier read into the Congressional Record, might have distracted him from legislative business, but the Court said Gravel was nonetheless not exempt from the inquiry. *Gravel* v. *United States*, *supra*, 408 U.S. at 622, 92 S.Ct. 2614. *Gravel* and other opinions finding the legislative immunity cloak wanting in particular settings, *see United States* v. *Brewster*, *supra*; *Doe* v. *McMillan*, *supra*, 412 U.S. at 314-15, 93 S.Ct. 2018, conclusively establish that subjecting Representative Passman to a damages action does not, without more, contravene the speech or debate clause.

[18, 19] Rather than blanket immunity from burdensome litigation, the clause provides protection only against inquiries into legislative policy-formulation processes. Enacting legislation is the province of Congress and Congress alone. The speech or debate clause assures members of Congress that their actions in formulating and enacting legislation, from the committee stage through

voting, will not be subjected to judicial (or executive) inquiry. But the immunized act must be intimately cognate to the legislative process. The reason for an absolute rather than qualified immunity is that the prospect of an unsuccessful but burdensome lawsuit might affect a legislator's performance of his or her legislative duties, thus distorting the democratic process. Because of our devotion to an unfettered representative government, we foreclose even well-founded lawsuits challenging the performance by members of Congress of their legislative roles.

The language of the Supreme Court's speech or debate decisions supports this view. *Tenney* v. *Brandhove*, *supra*, announced that legislators are protected when "acting in the sphere of legitimate *legislative* activity." 341 U.S. at 376, 71 S.Ct. at 788 (emphasis added).[23] More recent cases have elaborated on *Tenney*'s oft-cited formula. In *Gravel* v. *United States*, *supra*, the Court said:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of *speech, debate, and deliberation* without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.

408 U.S. at 616, 92 S.Ct. at 2622 (emphasis added).[24] The Court said the clause's purpose was "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*," 408 U.S. at 618, 92 S.Ct. at 2623 (emphasis

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[23] We adopted the *Tenney* formula in *City of Safety Harbor* v. *Birchfield*, 529 F.2d 1251 (5th Cir. 1976).

[24] This passage from *Gravel* was emphasized again in *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 503, 95 S.Ct. at 1821-22, 44 L.Ed.2d at 336. The issuance of subpoenas as part of a legitimate committee investigation was found to be an integral part of the process by which members participate in House proceedings with respect to the formulation and consideration of legislation; accordingly, speech or debate protection attached.

added), adding that the three earlier speech or debate cases, *Kilbourn*, *Dombrowski* and *Powell*,

> reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.

408 U.S. at 620, 92 S.Ct. at 2625. The Court reiterated that "the Clause has not been extended beyond the legislative sphere", and, of particular relevance here, the Court emphasized that the fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." 408 U.S. at 624-25, 92 S.Ct. at 2627. The *Gravel* Court continued:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe*, 1st Cir., 455 F.2d at 760.

408 U.S. at 625, 92 S.Ct. at 2627. The Court then stated its holding:

> "Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate

> by impermissibly exposing its deliberations to executive influence.

408 U.S. at 625, 92 S.Ct. at 2627.

A year later in *Doe* v. *McMillan*, *supra*, the Supreme Court reiterated the limited scope of the clause. In rejecting the argument that publication and distribution of a committee report was essential to the legislative process and therefore within the speech or debate clause, the Court said, "Our cases make perfectly apparent . . . that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." 412 U.S. at 313, 93 S.Ct. at 2025. The Court added, "'[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role.'" 412 U.S. at 320, 93 S.Ct. at 2028, quoting *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377, 71 S.Ct. 783 (brackets in original). Finally, the Court said,

> The business of Congress is to legislate; Congressmen and aids are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' *Tenney* v. *Brandhove*, 341 U.S., at 376, 71 S.Ct. 783, they enjoy no special immunity from local laws . . . .

412 U.S. at 324, 93 S.Ct. at 2030.

These statements compel the conclusion that representatives are not immune from inquiry into their decisions to dismiss staff members. Such dismissal decisions certainly are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States*, *supra*, 408 U.S. at 625, 92 S.Ct. at 2627. Peripheral or tangential activities of a representative must not be confused with the legislative core. A representative's transgressions are not given absolute absolution. The Constitution establishes an immunity for aberrations in a representative's legislative activities, but members of Congress become mere mortals when they operate in more mundane fields. When members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered.[25]

Our decision today does no more than give effect to the Supreme Court's mandate in *Gravel*: "Legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." 408 U.S. at 615, 92 S.Ct. at 2622. If legislators are bound by the law they create, they are even more clearly bound by the United States Constitution. The very premise

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[25] One could argue on Representative Passman's behalf that, because high-ranking staff members may sometimes affect a legislator's performance of his or her deliberative role, dismissal decisions should be protected by the speech or debate clause. The justification for establishing absolute immunity would be that the fear of an unfounded but burdensome lawsuit might influence a decision whether to fire an assistant, thereby impermissibly affecting the legislative process.

We find, however, that such an argument cannot help Representative Passman. Our decision leaves members of Congress free to dismiss staff members for any reason or for no reason, so long as broad limits established by the Constitution are not exceeded. Representatives will be afforded a broad good faith defense, *see* page 881, *infra*, and will be subject to liability in only the most egregious cases. The very low likelihood of recovery in unfounded cases will make the number of filings low. Moreover, summary judgment procedures, if applied judiciously, will minimize any burden. The chance that a legislator's dismissal decision will be affected by the prospect of a burdensome but meritless suit is therefore remote. The prospect that a dismissal decision will in turn affect the legislative process is also extremely remote. These layered causation gaps defeat the argument for absolute immunity. By limiting representatives to qualified immunity we achieve the immunity doctrine's goals without needlessly sacrificing the availability of redress for clear constitutional violations.

Moreover, on this record we have no way of knowing whether Davis's position gave her a meaningful input into the Representative's legislative decisionmaking. Even if speech or debate protection extended to decisions to dismiss high-ranking assistants, the clause would not sustain the Representative's 12(b)(6) motion here.

upon which the Constitution stands is the equality of all persons before the law. Exceptions to that premise must be limited, guarded, and sparingly employed. Davis is entitled to have her claim heard on the merits.

5. *Qualified Immunity*

The inapplicability of speech or debate protection does not foreclose Representative Passman from asserting the same qualified immunity available to other government officials. *See generally Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).[26] Although *Wood* and *Scheuer* were § 1983 actions, their reasoning is equally applicable to this action founded directly on the constitution. *Cf. Bevins* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand) (Lumbard, J., concurring).

[20, 21] The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity such as that recognized in *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Speech or debate protection is coextensive with the need to afford members of Congress absolute immunity. Absolute immunity extends only to certain key governmental officials, and then only when they are governing. It extends to prosecutors when they are prosecuting, *Imbler* v. *Pachtman*, *supra*, to judges when they are judging, *see Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), and to legislators when they are legislating, *e.g.*, *Kilburn* v. *Thompson*, *supra*. As indicated, however, legislators are not legislating when they dismiss staff members. For the same reasons that the speech or debate clause does not extend to staff dismissals, Representative Passman cannot invoke absolute immunity.

Qualified immunity is available "in varying scope," "the variation being dependent upon the scope of discretion and responsibilities of the office and all the cir-

[26] We use "qualified immunity" as synonymous with "good faith defense." *See* note 22 *supra*.

cumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 247-48, 94 S.Ct. at 1692. The legitimate interest in assuring members of Congress broad discretion in their staffing decisions and the importance of staffing decisions to a legislator's performance dictate that the scope of the Representative's qualified immunity is broad. In limiting the immunity to "good faith, non-malicious action," however, the Court in *Wood* v. *Strickland* made clear that a violation of constitutional rights could not be justified by "ignorance or disregard of settled, indisputable law". 420 U.S. at 321, 95 S.Ct. at 999-1000, 43 L.Ed.2d at 225.[27] In light of the settled, indisputable principle that federal government sex discriminations not supported by rational (or perhaps compelling) legitimate justifications are unconstitutional, *see*, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the likelihood that Representative Passman will be able successfully to maintain a good faith defense even under the liberal standard governing congressional staffing decisions appears very remote.[28] Because this case must be remanded for a trial at which Representative Passman will be free to press his claim that the dismissal was not based on Davis's gender, however, we need do no more at this stage than point out that any qualified immunity plea will be governed by the principles to which we have adverted. The determniation that Representative Passman cannot claim absolute immunity is sufficient to re-

[27] *Wood* involved school officials, but we have applied its principles more broadly. *See Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976). *See also Morris* v. *Travisono*, 528 F.2d 856 (1st Cir. 1976); *Mukmuk* v. *Commissioner of Dep't of Correctional Services*, 529 F.2d 272 (2d Cir. 1976); *Hanneman* v. *Breier*, 528 F.2d 750 (7th Cir. 1976).

[28] The good faith defense must of course be distinguished from a defense denying that the firing was discriminatory. The former asserts that the firing was unconstitutional but that the Representative acted in good faith and therefore should not be held liable. The latter asserts that gender was not the basis of the dismissal and that the dismissal therefore was not unconstitutional. *Wood* makes a successful assertion of the former defense unlikely, *Wood* does not affect the latter defense.

quire reversal of the dismissal given in his favor. *See, e.g., Scheuer* v. *Rhodes*, 416 U.S. 232, 239, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Sims* v. *Adams*, 537 F.2d 829 (5th Cir. 1976).

C. *Declaratory Relief*

The final form of relief that Davis seeks is declaratory. Although a claim for declaratory relief could be pursued independently of any right to other types of relief, *see Powell* v. *McCormack*, 395 U.S. 486, 518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), the absence of any forward-looking scope of operation for any declaration of Davis's rights as against Representative Passman, whose congressional tenure is virtually at its end, would make the propriety of such a declaration questionable.[29] This issue loses its significance, however, in view of our holding that a damages remedy is available. We therefore decline to pass on the propriety of declaratory relief.

III. Conclusion

In summary, taking the complaint's allegations as true, Representative Passman's dismissal of a staff member on the basis of gender violated the equal protection component of the fifth amendment due process clause. Under *Bivens* the Constitution itself affords the dismissed staff member a damages remedy. Sovereign immunity does not bar a damages award against the Representative individually. The speech or debate clause does not extend to staff dismissals because they are not "legislative tasks" within the Supreme Court holdings. Finally, the existence of qualified immunity cannot support the district court's dismissal of the complaint.

REVERSED AND REMANDED.

JONES, Circuit Judge (dissenting):

It seems to me that the judges should refrain from wearing their robes in the halls of the Congress. The doctrine of separation of powers should, I believe, require the affirmance of the dismissal of the action.

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[29] Davis has not alleged a desire to work for other representatives whose employment decisions might be affected by the resolution of her constitutional claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted in printing)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING EN BANC—
Filed February 16, 1977

NOW INTO COURT, through undersigned counsel, comes Defendant-Appellee, OTTO E. PASSMAN, who respectfully petitions this Court for a rehearing en banc for the following reasons:

1.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions: Eastland v. United States Servicemen's Fund, 421 US 491 (1975); Doe v. McMillan, 412 US 306 (1973); and Gravel v. United States, 408 US 606, reh den 409 US 902 (1972).

2.

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: 1. Whether the hiring and firing of staff members by Congressmen is protected from judicial inquiry by Article 1, Section 6 of the United States Constitution. 2. Whether the hiring and firing of staff members by Congressmen is a

political question, thus rendering the controversy non-justiciable.

HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71201

By /s/ Jesse D. McDonald
JESSE D. MCDONALD
Attorney of record for
Otto E. Passman,
Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1691

SHIRLEY DAVIS, PLAINTIFF-APPELLANT

versus

OTTO E. PASSMAN, CONGRESSMAN OF THE UNITED STATES, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion January 3, 1977, 5 Cir., 197—, —— F2d ——)

ORDER—May 17, 1977

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1691

SHIRLEY DAVIS, PLAINTIFF-APPELLANT

v.

OTTO E. PASSMAN, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

OPINION—April 18, 1978

Before BROWN, Chief Judge, JONES, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

In today's decision the court en banc reverses a panel opinion which implied a cause of action for money damages from the Due Process Clause of the fifth amendment to the Constitution.[1]

[1] The opinion of the panel, 544 F.2d 865 (5th Cir. 1977), had, in turn, reversed the district court's dismissal of a complaint filed by a discharged female congressional employee.

In her complaint, Ms. Shirley Davis alleged that former Louisiana Congressman Otto Passman dismissed her as his Deputy Administrative Assistant solely because she was a woman and he wanted a man in the position. Davis claimed Passman's actions violated the equal protection component of the fifth amendment Due Process Clause. Invoking the court's jurisdiction under 28 U.S.C.A. § 1331 (a), she sought specific relief, damages, and declaratory relief. Because Passman's service in Congress ended after the suit was brought, the claim has narrowed to one for recovery of money damages. The district court based its dismissal of the complaint on alternative grounds: (1) that the law affords Davis no private right of action and (2) that the conduct of which she complained did not violate the Constitution. Addressing only the surviving claim for money damages, we affirm the district court's dismissal on the first ground.

The roster of constitutional rights which have been held to support implied damage actions began its growth with the Supreme Court's seminal decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Court noted that historically damages have been regarded as the "ordinary remedy for an invasion of personal interests in liberty," and implied a cause of action for money damages for the invasion of the plaintiff's liberty which abridged his fourth amendment rights. 403 U.S. at 395, 91 S.Ct. at 2004, 29 L.Ed.2d at 626.

Although the Supreme Court has neither extended nor further explained its initial position, many inferior federal courts have cited *Bivens* as authorizing implied actions for money damages based on constitutional rights other than the fourth amendment.[2] Generally, these deci-

[2] Apart from the Due Process Clauses, lower federal courts have looked favorably upon *Bivens* actions based upon the first, sixth, eighth, ninth, and thirteenth amendments. *See, e.g., Cox* v. *Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments); *Paton* v. *La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (first amendment); *Jihaad* v. *Carlson*, 410 F.Supp. 1132 (E.D.Mich. 1976) (first and eighth amendments); *Berlin Democratic Club* v. *Rums-*

sions have recognized implicitly that *Bivens* has some yet unreached limits. Only isolated district court decisions have asserted that *Bivens* created damage actions for violation of constitutional rights as broadly as if it had decreed that 42 U.S.C.A. § 1983 applied to the federal government.[3] This appeal requires either that we join other circuits in projecting the scope of *Bivens* to the Due Process Clauses of the fourteenth and fifth amendments,[4]

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feld, 410 F.Supp. 144, 160-62 (D.D.C. 1976) (first and sixth amendments); *Patmore* v. *Carlson*, 392 F.Supp. 737 (E.D.Ill. 1975) (fifth and eighth amendments). *See also* M. Lehmann, *Bivens and Its Progency*, 4 Hastings Const. L.Q. 531, 566-72 (1977).

[3] *E.g.*, *Saffron* v. *Wilson*, 70 F.R.D. 51, 53 n.1 (D.D.C. 1975) ("This holding [*Bivens*] has been interpreted almost unanimously as recognizing a cause of action for damages for violation of any constitutionally protected interest."); *Gardels* v. *Murphy*, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) ("*Bivens* recognizes a cause of action for damages for violation of any constitutionally protected interest.")

[4] Several circuits have allowed plaintiffs to base *Bivens* implied actions solely upon the concept of due process: the Second Circuit, *Gentile* v. *Wallen*, 562 F.2d 193, 196 (2d Cir. 1977) (fourteenth amendment); the Third Circuit, *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); *but see Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977) (declining to allow cause of action on fourteenth amendment alone); the Fourth Circuit, *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); the Seventh Circuit, *Fitzgerald* v. *Porter Memorial Hospital*, 523 F.2d 716, 718-19 & n.7 (7th Cir. 1975) (denying relief, but holding action could be brought solely under fourteenth amendment); the Eighth Circuit, *Owen* v. *City of Independence*, 560 F.2d 925, 932 (8th Cir. 1977) (fourteenth amendment in suit seeking back pay); the Ninth Circuit, *Jacobson* v. *Tahoe Regional Planning Agency*, 558 F.2d 928, 936-37, 941-43 (9th Cir. 1977) (one cause of action available on fifth amendment just compensation clause and another on fifth amendment due process clause).

Other circuits have commented favorably upon extension of *Bivens* to actions implied from the concept of due process: the Tenth Circuit, *e.g.*, *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 932 & n.5 (10th Cir. 1975) (apparently referring to the fifth amendment); the D.C. Circuit, *e.g.*, *Lewis* v. *D.C. Dep's of Corrections*, 174 U.S.App.D.C. 483, 484, 533 F.2d 710, 711 (1976).

[Footnote continued on page 47]

or decline to follow their precedents. A choice is not foreclosed. In more than one decision the Supreme Court specifically has pointed out that this issue remains open.[5]

Our own decisions appear equivocal on this point. We have ruled district courts erred in finding no jurisdiction to consider damage claims based upon implied causes of action under the Due Process Clauses of both the fifth amendment, *Weir* v. *Muller*, 527 F.2d 872 (5th Cir. 1976), and the fourteenth amendment, *Reeves* v. *City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976). *See also Roane* v. *Callisburg Independent School District*, 511 F.2d 633, 635 n.1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799, 801-02 & n.2 (5th Cir. 1974); *Traylor* v. *City of Amarillo*, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). However, in *Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc), we expressly declined to speak as an en banc court on the appropriateness of extending *Bivens* beyond the fourth amendment. Now we find ourselves face-to-face with the necessity to take a firm position.

To decide whether to imply a cause of action for money damages from the fifth amendment Due Process Clause, we must examine *Bivens* itself. While *Bivens* is not without ambiguity, the analysis employed by the Court shows that the cause of action created is not wholly of constitu-

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[4] [Continued]

The First Circuit has declined to imply a cause of action against municipalities from the fourteenth amendment Due Process Clause to grant damages for wrongful death. *Kostka* v. *Hogg*, 560 F.2d 37, 44 (1st Cir. 1977).

[5] In several cases since *Bivens*, the Supreme Court has expressly left open the question whether an action for damages might be implied from the Due Process Clauses. *Mt. Healthy School Dist.* v. *Doyle*, 429 U.S. 274, 277, 97 S.Ct. 568, 571, 50 L.Ed.2d 471, 477 (1977); *Aldinger* v. *Howard*, 427 U.S. 1, 3 n.3, 96 S.Ct. 2413, 2415 16 n.3, 49 L.Ed.2d 276, 280 n.3 (1976); *City of Charlotte* v. *Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 284 n.1, 96 S.Ct. 2036, 2038 n.1, 48 L.Ed.2d 636, 639 n.1 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 432-33, 93 S.Ct. 602, 610, 34 L.Ed.2d 613, 624 (1973). *See also City of Kenosha* v. *Bruno*, 412 U.S. 507, 514, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109, 116 (1973).

tional dimensions. The opinion of the Court expressly states:

> we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

403 U.S. at 397, 91 S.Ct. at 2005, 29 L.Ed.2d at 627. The cases relied upon for guidance by the Court in *Bivens* dealt with implying a cause of action from federal statutes that created rights but provided no federal remedy.[6] Moreover, in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court's most comprehensive treatment of implied statutory causes of action, the Court relied upon *Bivens* to support two points of its four-part statutory analysis.[7]

If the fourth amendment had mandated a cause of action for monetary damages, *Bivens* would have had no occasion to consult or discuss the action or inaction of Congress. Since the Court explicitly reasoned its prece-

[6] *See* 403 U.S. at 396-97, 91 S.Ct. at 2005, 29 L.Ed.2d at 626-27, *citing J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423, 428 (1964) (federal securities laws); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (action for abuse of process through misuse of statute governing Congress' subpoena power); *United States* v. *Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954) (indemnity action by government under Federal Tort Claims Act); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 311, 67 S.Ct. 1604, 1609-10, 91 L.Ed. 2067, 2073 (1947) (government sought implied remedy, based upon established common law action).

[7] *Bivens* is cited in *Cort* to support the proposition that causes of action for damages should not be implied to govern matters "traditionally relegated to state law, in an area basically the concern of the States," 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36, and the proposition that where such actions have been implied, "there has generally been a clearly articulated federal right in the plaintiff," *id.* at 82, 95 S.Ct. at 2090, 45 L.Ed.2d at 39.

dent on the latter ground, we take the *Bivens* remedy to be one implied as a matter of federal common law[8] and therefore subject, like all such law, to the power of Congress to alter or withdraw. Therefore, we employ a two-step analysis. First, we look to the jurisprudence of statutory implication to determine whether to imply a damage action of non-constitutional dimensions. Second, if this initial inquiry does not suggest that such an action should be implied, we must determine whether the Constitution nevertheless compels the existence of a remedy in damages to vindicate the rights asserted. *See Kostka* v. *Hogg*, 560 F.2d 37, 42 (1st Cir. 1977). Applying this analysis to Davis' claim, we find that the district court properly concluded that no cause of action existed.

[1] Courts have considered several factors in determining whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appro-

[8] *See Kostka* v. *Hogg*, 560 F.2d 37, 44 & n.7 (1st Cir. 1977). *See also Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1193-94 (5th Cir. 1977) (en banc). *See generally Jacobson* v. *Tahoe Regional Planning Agency*, 558 F.2d 928, 937 & n.14 (9th Cir. 1977); C. Wright, *Federal Courts* § 60 (3d ed. 1976), *citing D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 465-75, 62 S.Ct. 676, 683-88, 86 L.Ed. 956, 966, 971 (1942) (Jackson, J., concurring):

> Federal common law implements the federal Constitution and statutes, and is conditionel by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law . . . .

315 U.S. at 472, 62 S.Ct. at 686, 86 L.Ed. at 969; Monaghan, Foreword: Constitutional Common Law, 89 Harv.L.Rev. 1, 10-13, 22-26 (1975).

Where a remedy is of constitutional dimensions and particular elements are not subject to revisions by Congressional legislation, the Court has clearly so indicated. *See, e.g., Jacobs* v. *United States*, 290 U.S. 54 S.Ct. 26, 78 L.Ed. 142 (1933); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1923).

priate for federal law. *Cort* v. *Ash*, 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36 (1975). Of course, the factors examined in questions of implied statutory causes of action, as set forth in *Cort* and preceding cases, cannot be applied in precisely the same way where implying a *Bivens*-type action is at issue. However, this circuit has held that the *Cort* factors do not set forth a rigid pattern of analysis that a court must follow precisely. Rather, "the Court simply said that several factors were relevant and worthy of consideration." *Olsen* v. *Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

Where federal courts have inferred a federal private cause of action not expressly provided, there generally has been a clearly articulated federal right in the plaintiff. *Cort* v. *Ash*, 422 U.S. 66, 82, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26, 38 (1975), *citing Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 394-95, 91 S.Ct. 1999, 2003-04, 29 L.Ed.2d 619, 625-26 (1971). While the fifth amendment right to due process certainly confers a right upon Davis, the injury alleged here does not infringe this right as directly as the injury inflicted in the unreasonable search of Webster Bivens offended the fourth amendment. The concept of due process encompasses virtually all of the civil liberties derived from the Constitution. While the fifth amendment Due Process Clause surely exists for the "especial benefit" of Davis, as *Cort* required, it does not exist with equal certainty to protect her tenure in a noncompetitive personal aide position statutorily denominated as service at will. 2 U.S.C.A. § 92.

Cort looked to "legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36. *Bivens* recognized that congressional intent to create a remedy must guide a court in determining whether to imply a remedy from provisions of the Constitution. 403 U.S. at 396-97, 91 S.Ct. at 2004-05, 29 L.Ed.2d at 626-27. Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position. In Section 701, Title VII of the Civil Rights Act of 1964, Congress excluded the federal government from the general definition of

"employer," thus denying federal employees a statutory damage actior under Title VII. 42 U.S.C.A. § 2000e(b). In 1972, Congress amended Title VII to add Section 717, which provided a separate administrative remedy for discrimination in federal employment, but did not extend the remedy to employees of Congress not in the competitive service. Under Section 717, other federal employees may have review in the federal courts of final action by their employing agencies or the Civil Service Board of Review, 42 U.S.C.A. § 2000e-16(a) (1974). Congressional action in designing Title VII remedies shows Congress adhered to the legislative judgment expressed in the statute under which Davis was hired: Members of a congressman's personal staff are removable by him "at any time . . . with or without cause." 2 U.S.C.A. § 92.

Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect. When Congress enacted Section 717, it believed that no other effective remedy existed for federal employees treated discriminatorily. *See Brown* v. *General Services Admin.*, 425 U.S. 820, 826-28, 96 S.Ct. 1961, 1965-66, 48 L.Ed.2d 402, 407-08 (1976); H.R.Rep.No. 92-238, 92d Cong. 2d Sess., [1972] U.S. Code Cong. & Admin.News. pp. 2137, 2160. However, in amending Title VII to make it the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination" for those federal employees it covered,[9] Congress did not grant federal employees in the competitive service an action for damages against their superiors in their individual capacities.[10] The Supreme Court has upheld the exclusivity of Title VI Ias a remedy for federal employment discrimination against employees in the competitive service whom it covers. In *Brown*, the Court held that Congress could require federal employees alleging discrimination to seek relief solely within the confines of Title VII, a limitation which plaintiffs could not surmount by the simple expedient of putting a different label

on the pleadings. 425 U.S. at 832, 96 S.Ct. at 1968, 48 L.Ed.2d at 411. Congress cannot have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection.

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[9] 425 U.S. at 828, 96 S.Ct. at 1966, 48 L.Ed.2d at 408.

[10] Section 717, 42 U.S.C.A. § 2000e 16(c) (1974), allows an employee or applicant aggrieved by final action or a failure to take final action on his administrative complaint to file a civil action under Section 706, 42 U.S.C.A. § 2000e-5 (1974), in which "the head of the department, agency, or unit . . . shall be the defendant." However, under this section, federal defendants may be sued only in their official capacities, and not as individuals. *See Keeler* v. *Hills*, 408 F.Supp. 386, 387 (N.D.Ga. 1975); *see also Jones* v. *Brennan*, 401 F.Supp. 622, 627 (N.D.Ga. 1975).

48 L.Ed.2d at 411. Congress cannot have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection.

Cort calls for an examination of the consistency of a statutory cause of action with the statutory scheme enacted by Congress. 422 U.S. at 78, 84, 95 S.Ct. at 2088, 2090-91, 45 L.Ed.2d at 39. The Court in *Bivens* made an analogous inquiry in considering the particular difficulties presented in enforcing the guarantees of the fourth amendment. The fourth amendment has presented the Court with a series of remedial dilemmas, not encountered in other contexts, with which the Court has wrestled actively for over half a century. The amendment's subject matter is such that law enforcement officials, who necessarily make the searches and seizures it governs, are themselves the group most likely to be hostile to its barriers. This hostility of law enforcement officials to the restraint of the fourth amendment led the Court initially to adopt the exclusionary rule for federal causes. *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and then to apply it to the states in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), when criminal actions and state law tort actions proffered as a substitute remedy in *Wolf* v. *Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), showed themselves ineffective. However, the exclusionary rule—the remedy chosen to secure the right—also has proved less than satisfactory. *See Bevins* v. *Six Unknown Named Agents*, 403 U.S. at 411, 91 S.Ct. at 2012, 29 L.Ed.2d 635 (1971) (Burger, C. J., dissenting). Thus the Court continues to struggle for a just means for enforcing the fourth amendment. *See Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976).

Violations of fourth amendment rights occur in a well-defined setting familiar to the courts. The relationship is always one between law enforcement officials and citizens suspected of possessing evidence of crime. The context in which these violations may arise is sufficiently limited to allow the court to determine that an action for damages would be consistent with the purpose of the

fourth amendment in future instances in which such an action might be invoked. The fifth amendment Due Process Clause presents no similarly focused remedial issue. To the contrary, the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable and that there is simply no way a court can judge whether this remedy will be appropriate for securing the right in future situations where some plaintiff might assert it.

The final factor considered in *Cort* is whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 84-85, 95 S.Ct. at 2088, 2091, 45 L.Ed.2d at 36, *citing Bivens* v. *Six Unknown Named Agents*, 403 U.S. at 394-95, 91 S.Ct. at 2003-04, 29 L.Ed.2d at 625-26. Under this factor we consider the effect that implying a remedy would have upon both state law and the federal judiciary. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480, 494 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-741, 95 S.Ct. 1917, 1927-28, 44 L.Ed.2d 539, 551-52 (1975). While the particular circumstances of the case at bar raise questions of federal rights in federal employment, adoption of the broad principle upon which the granting of relief to Davis hinges would expand federal jurisdiction into broad fields of law presently occupied by state court systems. Therefore, we properly consider this factor.

Adoption of Davis' interpretation of *Bivens* would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law because, by its nature, every tort deprives the victim of due process through unlawful appropriation of liberty or property or both. Indeed, logically, the expansive effect of such a holding would not end there. It also would extend federal jurisdiction to cover all state action tort claims, either under pendent jurisdiction, *cf. Hagans* v. *Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577

(1974), or under a cause of action implied from the fourteenth amendment. The latter of these state action claims would be cognizable without regard to diversity of citizenship, amount in controversy or other present statutory limitations. Because of the breadth of due process, a decision implying an action for money damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee. Thus, the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings looms far more ominously than in *Bivens*. 403 U.S. at 391 & n.4, 91 S.Ct. at 2002 & n.4, 29 L.Ed.2d at 623 & n.4.

Not only does this case fail to present special remedial difficulties analogous to those faced by the Court in dealing with the fourth amendment, but also Congress avoided creating an action for money damages for Congressional aides in non-competitive positions. Moreover, implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary and whose resolution is better suited to courts of general jurisdiction. These special considerations, not present in *Bivens*, eliminate any question of our creating a remedial right under our federal common law powers. This conclusion does not end our inquiry, however, for we still must determine whether the Constitution nevertheless compels an action for money damages implied from the fifth amendment Due Process Clause.

[2] Therefore, we next consider whether, in this case, a damage action is indispensible to the effectuation of the fifth amendment Due Process Clause and thus beyond the power of Congress to preclude. *Cf. Kostka* v. *Hogg*, 560 F.2d at 44. We conclude that the proposed damage remedy is not constitutionally compelled. Not every right that conceivably could be wedged within the literal breadth of due process demands federal protection through a cause of action for monetary damages. In *Paul* v. *Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court considered the reach of federal

remedies where Congress, in 42 U.S.C.A. § 1983, expressly provided that violation of constitutional rights by one acting under color of state law would give rise to a cause of action for monetary damages. Even with an express statutory mandate to provide a federal damage action, the Court noted that " 'the range of interests protected by procedural due process is not infinite.' " 424 U.S. at 709, 96 S.Ct. at 1164, 47 L.Ed.2d at 418 (1976), *citing Board of Regents* v. *Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). Here, we do not consider, as the Court did in *Paul*, what due process may encompass given an express statutory mandate to extend a cause of action for money damages to the full reach of the right. Rather, we consider the extent to which the Constitution requires that we countermand the clearly discernible will of Congress to create a cause of action where Congress declined to provide one. *Paul* thus teaches that we should restrain our reach far more than the Court did there.

Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief where the employer remained in office, although congressional employees in the non-competitive service whose allegedly discriminating employers are not in office may be left without a remedy for sex discrimination in employment unless Congress reverses its present statutory stand.[11] Other due process wrongs would either continue to be remedied in traditional ways through tort actions in courts of appropriate general jurisdiction or through special statutory remedies provided by state legislatures or Congress. Admittedly, some not now covered would remain inactionable.

Another provision of the Constitution must also be considered. Our rejection of the broad principle asserted by Davis is premised upon much more than just another

[11] Davis has not challenged the distinction in Title VII between federal employees in competitive positions and those non-competitive positions for the purposes of Title VII remedies.

"floodgates" argument. The prospect here is of so crushing an already precariously overloaded federal judicial system as to render meaningless the power the Constitution vests in Congress under Article III, Section 1, of the Constitution to establish the jurisdictional ambits of the inferior courts it has created. We decline to hold that by implication the fifth amendment requires such an anomalous result.

[3] Given these consequences and our inability to construct a plausible measure for acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged, we refuse to take even a first step down the slippery slope until the Supreme Court answers the open question of whether any such right should exist. Because no right of action may be implied from the Due Process Clause of the fifth amendment, the district court correctly ruled that no civil action for damages may be maintained here. Absent such a right of civil action, the district court cannot exercise jurisdiction under 28 U.S.C.A. § 1331(a), which confers jurisdiction only for "civil actions wherein the matter in controversy . . . arises under the Constitution . . . of the United States." To the extent that *Weir* is inconsistent with this position, it is overruled. Our affirmance on the jurisdictional ground means we do not reach Davis' second contention. Therefore, we vacate the district court's decision on the ground that Passman's conduct in firing her did not violate the Constitution.

The judgment of the district court is

AFFIRMED IN PART, AND IN PART VACATED.

JONES, Circuit Judge, specially concurring:

If there is a constitutional barrier against the exercise of the judicial power to decide the controversy between Mrs. Davis and Mr. Passman then, so I believe, that bar should be raised rather than denying relief because the Congress has failed to enact legislation providing a remedy.

I do not believe that the constitutional provisions here pertinent are to be confined to the Speech and Debate clause.[1] The broader provision by which all legislative powers are vested in the Congress [2] is relevant to this cause. It might be said that the doctrine of inclusio unius est exclusio alterious permits or requires a construction that a Congressman may be judicially questioned for any and all else that a Congressman might do in the exercise of the legislative power except in speech or debate. Obviously the Constitution has no such meaning. We may remind ourselves of Chief Justice Marshall's reminder as to constitutional construction.[3]

In no small measure the genius of the Founding Fathers in framing that most wonderful work ever struck off by man [4] is the separation of powers among the three branches of government. Although the need for checks and balances requires that no one of the departments shall be wholly unrelated to each of the others [5] the essential functions of each are, by the terms of the instrument, separate from those of the others.[6]

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[1] The Senators and Representatives . . . for any speech or debate in either House . . . shall not be questioned in any other place. U.S. Const. Art. 1, § 6(1).

[2] U.S. Const. Art. 1, § 1.

[3] "We must never forget that it is a constitution we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

[4] William E. Gladstone, 127 North American Review 179 (Sept. —Cot. 1878).

[5] J. Madison, The Federalist, No. XLVIII (1852 ed.).

[6] It may be appropriate to take note of a recent comment of the Attorney General that although the Constitution and Statutes provide that the President shall nominate and by and with the advice and consent of the State shall appoint federal judges and U.S. attorneys the reality is that "the Senate nominates and the President confirms persons to fill those officers." Griffin B. Bell, Washington Post, February 27, 1978.

Notwithstanding the Gravel [7] and Brewster [8] cases and Senator Ervin's critical comments upon them [9] the doctrine of separation of powers survives.

It is not necessary to say that all of the activities of the members of a Congressman's staff are legislative. It will not be said that they are not so in large measure. Their activities are as many and as varied as those of the members served by them. It has been well stated that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . ." *Gravel* v. *United States*, *supra*, 408 U.S. at 616-17, 92 S.Ct. at 2623.

It seems to me the court held that judicial relief is denied because the Congress has failed to provide a judicial remedy. Rather I think the court should say that the hiring and firing of his "alter ego" is a legislative activity and a part of the exercise of the legislative power. The question is not one of whether there is a judicial remedy. The question, as I see it, is whether or not the controversy is one involving the exercise of the legislative power and within the jurisdiction of the Congress. Let it decide whether there should be absolute immunity. Let it determine whether there is a right and if so to fashion a remedy and designate a tribunal to declare and enforce it. I think it should have been held that the complaint does not state a claim upon which relief can be granted.

RONEY, Circuit Judge, concurring:

I concur in the result reached by the majority opinion, but I am constrained to articulate the difference I see between this case, in which I agree that plaintiff has no constitutional damage remedy based on an alleged fifth

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[7] *United States* v. *Gravel*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

[8] *United States* v. *Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed. 2d 507 (1972).

[9] Sam J. Ervin, Jr., The Gravel and Brewster cases: An Assault on Congressional Independence, 59 Va.L.Rev. 175 (1973).

amendment violation, and the case of *Rodriquez* v. *Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (*en banc*), in which I joined a dissent on the ground that plaintiff there could claim damages against federal officers for an alleged due process violation.

In his concurring opinion in *Bivens*, Justice Harlan intimated that "the appropriateness of money damages may well vary with the nature of the personal interest asserted." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 n.9, 91 S.Ct. 1999, 2011, 29 L.Ed.2d 619, 634 (1971) (Harlan, J., concurring). The distinction I find between *Rodriguez* and the instant case lies in the nature of the personal interest asserted in the "due process" violations alleged. In *Rodriguez* the plaintiff was indicted, arrested, and held in bail for many months for a crime she knew nothing about and of which she was altogether innocent, because of the allegedly unconstitutional acts and conduct of a federal agent. In dissent, both Judges Coleman and Goldberg, with whom I concurred, held that plaintiff had a *Bivens*-type damage claim if the agent's acts were so reckless as to constitute a willful violation of the plaintiff's "right to remain free of unconstitutional intrusions by governmental agents." 556 F.2d at 1195.

To me, there is little distinction between the personal liberty invasion by arrest and indictment in *Rodriguez* and the personal liberty invasion by the private apartment search, seizure, and arrest in *Bivens*. Both cases involved the citizen's right to be let alone by Government agents, unless the agents act within the governmental powers ordained by the Constitution. The Constitution gave limited power to the Government it created. Without a constitutional base, no individual has the legal authority to act against another individual in the name of Government. Some governmental powers are specifically given, but to make absolutely sure that certain powers not given would not be read into the Constitution by overzealous Government officers, either executive, congressional, or judicial, there is a list of "shall nots" in the Bill of Rights. Many of the individual rights enumerated there were neither "created"

nor "given" by the Constitution, but rather were recognized as being inherent rights of individuals long before the summer of 1787. The framers' approach to those rights in the written Constitution was to try to assure they would remain forever free of governmental intrusion.

Such were the fundamental rights at stake in *Bivens* and *Rodriguez*. Even before the drafting of our Bill of Rights, plaintiffs Bivens and Rodriguez had an inherent right to be free from the type of intrusions they suffered. The constitutional amendments, in *Bivens*, the fourth, and in *Rodriguez*, the fifth—merely protected those rights by specific prohibition against encroachment. I saw *Rodriguez* as being controlled by *Bevins* and would have there held that the case law provided plaintiff Rodriguez with a damage remedy, a damage remedy rooted in preconstitutional notions of tort law.

In this case, however, no similar right is at stake. The defendant has not intruded upon a liberty interest with preconstitutional origins. Historically, employers had an inherent right to hire and fire whom they pleased, for whatever reason, arbitrarily, with no need to account to anyone for their actions, except perhaps to their conscience and their God, and for governmental employers, to their voters. This understanding of the employer-employee relationship prevailed when the Constitution was drafted and, indeed, formed the basis for decisions of the United States Supreme Court in this century. *See Adair* v. *United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed.2d 436 (1908); *Coppage* v. *Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915). Under this early theory, Ms. Davis had no right to be hired in the first place, and if hired, held her job subject to the whim of the individual who had the power to hire and fire.

But the Constitution has allegedly given her a right not to be fired on the basis of her sex. This right is not, however, a protected inherent right, but a right "created" by the Constitution, a right which in fact encroaches upon what was historically viewed as an inherent right of her employer.

Now the question is, Where does one find the roots for a damage remedy for a violation of this right so recently discovered in the recesses of the fifth amendment?

The dissenting opinion of Judge Goldberg repeatedly invokes the oft-quoted dictum that "where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939, 944 (1946), *quoted in Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). It is interesting to note, however, that the author of that statement, Justice Black, dissented in *Bivens* on the ground that "neither Congress nor the State of New York [had] enacted legislation creating . . . a right of action [for damages]." 403 U.S. at 428, 91 S.Ct. at 2020. (Black, J., dissenting).

The people, by both Constitution and statute, can and often do create rights for which they provide either no remedy or a restricted remedy for the violation thereof. In analyzing such rights, the courts are not entirely free to afford remedies which have not been provided by the creator of the rights. Thus, to me, Judge Clark makes a necessary analysis to determine whether a damage remedy is rooted in the document which created the violated right. Here we find the relevance of the analysis provided in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). To me also, this is where I part from Judge Goldberg, with whom I joined in *Rodriguez*.

The majority opinion does not "cut back" on *Bivens*. The underlying facts and concept of *Bivens*, by themselves, simply do not cover the rights asserted in this case. The question, then, is not whether *Bivens* applies, but whether the courts will infer from the Constitution itself a damage remedy for the violation of the kind of due process right here claimed. For here, a damage remedy must be rooted in the document—the Constitution—which created the violated right, or a subsequent statute, since there is no preconstitutional source for it.

This gets down to the real difference between the majority and the dissent, in my view. *Bivens* can easily be grounded on the premise that courts may remedy the unlawful violation of constitutionally "protected" individual rights. But it will better satisfy the revered concept of Government "by the people" if the rights "created" by Constitution or statute are remedied in only those ways that can safely be inferred from the creating documents.

Bivens, which produced five separate opinions, was not an easy decision. Lower courts probably disserve the law by carrying obviously difficult, narrow, limited decisions of the Supreme Court far beyond their intended reach. Such judicial activity subverts a major objective of law in an organized society: to provide certainty for human action. The majority of this Court has shown precisely the restraint required. If the people, through their elected officials, choose to provide the remedy sought here, so be it; but until then the courts, through their appointed judges, should not require it.

It is impossible to completely align the cases in such a way as to support the distinction made here between *Bivens* and *Rodriguez*, and this case. But so is it impossible to line up the cases to support any other logical *Bivens* premise. There is a bit of symmetry, however, if we look only at the facts of the cases, and the results, and disregard the verbalization of principles in the written opinions. In the purest sense, the facts and the result are the precedent from which *stare decisis* should flow anyway.

As the Supreme Court held in *Bell* v. *Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 90 L.Ed. 939 (1946) federal question jurisdiction, as opposed to a federally recognized right of relief, is created by the mere allegation of matters in controversy arising under the Constitution or laws of the United States. Most of the circuit court cases dealing with *Bivens*-type claims in constitutional areas other than the fourth amendment have decided only the federal jurisdiction question. Dicta aside, these cases have merely found allegations of constitutional violations to be sufficiently substantial to ground federal jurisdiction under 28 U.S.C.A. § 1331. This is altogether

different from inferring a *Bivens*-type damage remedy from the constitutional provisions asserted. *See, e.g., Weir* v. *Muller*, 527 F.2d 872 (5th Cir. 1976); *Lewis* v. *District of Columbia Dept. of Corrections*, 174 U.S. App.D.C. 483, 533 F.2d 710 (1976).

Indeed, the only cases cited by the dissent as extending *Bivens* beyond the fourth amendment to the due process rights of discharged employees were not *Bivens* remedy cases. In *Gentile* v. *Wallen*, 562 F.2d 193 (2d Cir. 1977) the Second Circuit held that a claimed denial of due process by a discharged elementary school teacher stated a cause of action arising directly under the fourteenth amendment. On the question of remedies, however, the court stated: "Whether money damages are available under this cause of action or only equitable relief . . . is a question of remedies that we need not reach . . . ." *Id.* at 197 n.4 (citation omitted). Since the power of federal courts to grant equitable relief for violations of constitutional rights was recognized prior to *Bivens*, the *Gentile* court did not really advance the march of *Bivens* into the area of fifth amendment rights. *See Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 400, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring); *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Likewise, in *Owen* v. *City of Independence*, 560 F.2d 925 (8th Cir. 1977) the Eighth Circuit held that a discharged city employee was entitled to monetary relief in the nature of backpay for violation of fourteenth amendment due process, but was careful to emphasize that it was discussing "only an equitable remedy . . . ." *Id.* at 933 n.9 and 940.

Cases in which circuit courts have inferred a *Bivens*-type damage remedy from constitutional amendments other than the fourth have varied widely in their facts, but have generally involved an intrusion into a liberty interest having preconstitutional origins. For example, the first amendment did not "create" the right to express one's views free from unlawful governmental intrusion; it merely protected an already present right from governmental inference.

> *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977) (speakers and demonstrators unlawfully arrested by

> District of Columbia police during 1971 "May Day" demonstration have cause of action for damages arising directly under first amendment);
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> *Paton* v. *LaPrade*, 524 F.2d 863 [862] (3rd Cir. 1975) (Bivens-type damage remedy for violation of first amendment rights available to 16-year-old school student who was investigated by FBI after sending off for literature from Socialist Workers Party in connection with her social studies class); *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975) (complaint alleging that because of antifluoridation speeches made by plaintiff, Department of Health, Education and Welfare coerced plaintiff's employer to fire him stated a *Bivens*-type damages action for violation of first amendment rights).

Nor did the due process clause of the fifth amendment "create" a right in the individual to be free from deprivation of liberty and property interests; it merely provided that government encroachment would be constitutional only if it followed the criteria therein provided.

> *Jacobson* v. *Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977) (allegation that certain zoning ordinances enacted by agency operating under federal law effectuated a "taking" of plaintiff's land states a *Bivens*-type damage claim arising directly under the fifth amendment);
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> *State*[*s*] *Marine Lines, Inc.* v. *Schultz*, [*Shultz*] 498 F.2d 1146 (4th Cir. 1974) (unlawful seizure of plaintiff's property by Customs agents gives rise to a *Bivens*-type damage action arising directly under fifth amendment);
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> *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (allegations that FBI agents falsified documents and testified falsely in order to convict plaintiff state cause of action for damages arising directly under fifth amendment).

These fundamental rights, unlike the liberty interest asserted by Ms. Davis, are not "created" by the Con-

stitution but are inherent in the individual, either, absolutely "protected" by the framers from encroachment by the Government, or "protected" to the extent provided in the Constitution.

In sum, a claim for damages should not be foreclosed merely because it arises out of a fifth amendment violation, rather than a fourth, but should be considered on the basis of the personal interest asserted. The remedy sought for the personal interest asserted by Ms. Davis cannot be infused into the Constitution without unduly burdening the reasoning with the hope, faith, and personal preference of the reasoner. Therefore, I would affirm the district court.

GOLDBERG, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, joins, dissenting:

A majority of the en banc court today holds that no private cause of action for damages may be implied from the due process clause of the fifth amendment to the United States Constitution. I believe that this conclusion, certainly as it applies to the facts of this case, is untenable so long as *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), is good law. Finding nothing in subsequent opinions of the Supreme Court which undercuts the vitality of the reasoning in *Bivens*, I would hold that Shirley Davis has a private right of action for damages to vindicate her constitutional rights. While recognizing that constitutional attrition may be the benchmark of the 1970's, I would leave it for the Supreme Court to place the mark of Cain on *Bevins*' heretofore unblemished brow. It is a source of deep regret that it is the Fifth Circuit, a court so often exemplary in its affirmation of constitutional rights, which has chosen to start *Bivens* down the slippery slope into desuetude and demise. I respectfully dissent.

I.

In the early part of 1974 Shirley Davis was Deputy Administrative Assistant to Congressman Otto E. Passman of Louisiana's Fifth Congressional District. The Representative terminated Ms. Davis's employment, effective July 31, 1974. In his letter to her explaining the termination decision the Representative wrote, "You are able, energetic and a very hard worker. . . . [H]owever, on account of the unusually heavy workload in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant to be a man." The full text of this rather remarkable letter is set out below.[1]

[1] Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,

/s/ Otto E. Passman
Member of Congress

Davis then filed this action against the Representative, claiming he had violated the equal protection component of the fifth amendment's due process clause. She invoked the court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331(a) and sought relief including, *inter alia*, damages from Passman in his individual capacity. The district court assumed jurisdiction of the case and proceeded to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), holding that "the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution" and that "the law affords no private right of action to plaintiff therefor." A panel of this court reversed the decision of the district court and remanded the case for trial. 544 F.2d 865 (5th Cir. 1977). The panel concluded that taking the complaint's allegations as true, Representative Passman's dismissal of a staff member on the basis of gender violated the equal protection component of the fifth amendment due process clause; that under *Bivens* the Constitution itself affords the dismissed staff member a damages remedy; that sovereign immunity does not bar a damages award against the Representative individually; that the speech or debate clause does not extend to staff dismissals because they are not "legislative tasks" within the Supreme Court's holdings; and that the existence of qualified immunity cannot support the district court's dismissal of the complaint. *See id.* at 882.

Circuit Judge Jones dissented from the judgment of the panel on the basis of the doctrine of separation of powers. *Id.* Representative Passman, by then defeated in his bid for reelection and retired from the Congress, filed a petition for rehearing en banc, alleging that congressional hiring and firing were insulated from judicial review under the political question doctrine and the speech or debate clause. The court granted rehearing en banc. Today, not reaching the thorny constitutional issues posed by the scope of congressional immunity under the speech or debate clause, the en banc majority determines that no right of action for damages may be implied from the fifth amendment due process clause. As I dissent

from this holding, I necessarily must reach the other issues, including the applicability of the speech or debate clause, considered in the panel opinion. On those issues, I would adhere to the analysis explicated in the panel opinion; I confine my remarks here to the *Bivens* question. On *Bivens*, the thrusts of Judge Clark's opinion for the en banc majority merit defensive parries in response.

II.

Only in one case has the Supreme Court directly confronted and decided the question whether a federal cause of action for damages may be implied directly from the United States Constitution: *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[2] Having created in that case "a policy of access," [3] the Court has since chosen to refrain from possibly premature rigidification of the contours of the *Bivens* action,[4] in effect licensing the lower federal courts to develop their own rules setting the parameters,[5] consistent with the mandate of *Bivens* itself, within which constitutional rights may be vindicated by private damage actions. As noted

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[2] Also worthy of mention is *Jacobs* v. *United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933) (founding right to recover just compensation directly on the fifth amendment; statutory recognition not necessary). Of course, it is clear "that there is an implied injunctive remedy for threatened or continuing constitutional violations." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 723 (2nd Cir. 1969), *rev'd on other grounds*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), citing *Bell* v. *Hood*, 327 U.S. 678, 684 and n. 4, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 696-97, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *United States* v. *Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). *See also Bivens, supra*, 403 U.S. at 400, 404, 91 S.Ct. at 2006, 2008, 29 L.Ed.2d at 628 (Harlan, J. concurring).

[3] Lehmann, "*Bivens* and Its Progeny," 4 Hastings Const.L.Q. 531, 539 (1977).

[4] *See* cases cited in majority opinion, *supra*, at n. 5.

[5] *See* Lehmann, *supra* n. 3, at 540, 604.

by the en banc majority, few courts have held that *Bivens* actions are limited to fourth amendment claims.[6]

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[6] See majority opinion, *supra*, at p. , slip op. at p. 3508. Apart from decisions in several circuits declining to imply causes of action against municipalities directly under the fourteenth amendment, in view of the exemption of municipalities from liability under 42 U.S.C. § 1983, *Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977); *McDonald* v. *State of Illinois*, 557 F.2d 596, 604-05 (7th Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 508, 54 L.Ed.2d 453 (1977); *cf. Mahone* v. *Waddle*, 564 F.2d 1018, 1022-25 (3rd Cir. 1977) (declining to imply a constitutional cause of action but finding an effective federal statutory remedy under § 1981), there appear to be no other decisions at the Court of Appeals level rejecting the availability of *Bivens* causes of actions under other constitutional amendments. Circuits founding causes of action directly on constitutional provisions other than the fourth amendment, or finding claims sufficiently substantial to ground jurisdiction on 28 U.S.C. § 1331, include the

D.C. Circuit: *Dellums* v. *Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (first amendment, cause of action); *Payne* v. *Government of District of Columbia*, 559 F.2d 809, 818-19 (D.C. Cir. 1977) (fifth amendment, jurisdiction; favorable dicta on cause of action); *Lewis* v. *District of Columbia Department of Corrections*, 174 U.S.App. D.C. 483, 533 F.2d 710 (1976) (fifth amendment, jurisdiction); *accord, Greenya* v. *George Washington University*, 167 U.S.App.D.C. 379, 385, 512 F.2d 556, 562 n. 13, *cert. denied*, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975); *Apton* v. *Wilson*, 165 U.S.App.D.C. 22, 35, 506 F.2d 83, 96 (1974); *Cardinale* v. *Washington Technical Institute*, 163 U.S.App.D.C. 123, 128, 500 F.2d 791, 796 n. 5 (1974); *Sullivan* v. *Murphy*, 156 U.S.App.D.C. 28, 55, 478 F.2d 938, 965 and n. 47, *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973) (fourth and fifth amendments, jurisdiction; favorable dicta on remedy).

Second Circuit: *Gentile* v. *Wilson*, 562 F.2d 193, 196-97 (2nd Cir. 1977) (fourteenth amendment due process, cause of action); *accord, Brault* v. *Town of Milton*, 527 F.2d 730, 734-35 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975).

Third Circuit: *Paton* v. *La Prade*, 524 F.2d 862, 869-70 (3rd Cir. 1975) (first amendment, cause of action); *United States ex rel. Moore* v. *Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972) (fifth amendment, cause of action); *Gagliardi* v. *Flint*, 564 F.2d 112, 114-16 (3rd Cir. 1977) (fourteenth amendment, jurisdiction; reserving question of cause of action); *id.* at 117 (Gibbons, J. concurring) (cause of action). *But see Mahone* v. *Waddle, supra.*

Fourth Circuit: *States Marine Line, Inc.* v. *Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment, cause of action);

cf. Cox v. *Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments, suggesting jurisdiction).

Fifth Circuit: *Reeves* v. *City of Jackson*, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under eighth amendment and/or fourteenth amendment due process, jurisdiction); *Weir* v. *Muller*, 527 F.2d 872 (5th Cir. 1976) (fifth amendment, jurisdiction); *see also Roane* v. *Callisburg Independent School District* 511 F.2d 633, 635 n. 1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799, 801-02 and n. 2 (5th Cir. 1974); *Traylor* v. *City of Amarillo*, 492 F.2d 1156, 1157 n. 2 (5th Cir. 1974). *But see Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc) (declining to speak on *Bivens* issue).

Sixth Circuit: *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975) (first amendment, cause of action; reasoning based on fifth amendment cases).

Seventh Circuit: *Fitzgerald* v. *Porter Memorial Hospital*, 523 F.2d 716, 718-719 n. 7 (7th Cir. 1975), *cert. denied*, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976) (fourteenth amendment, suggesting availability of cause of action but denying relief); *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976) (fourteenth amendment procedural due process, jurisdiction; favorable dicta); *cf. Cannon* v. *University of Chicago*, 559 F.2d 1063, 1082 (7th Cir. 1977) (dicta on availability of relief for violations of fundamental constitutional rights). *But see McDonald* v. *State of Illinois, supra.*

Eighth Circuit: *Owen* v. *City of Independence*, 560 F.2d 925 (8th Cir. 1977) (fourteenth amendment due process, cause of action for monetary relief in the nature of backpay against a municipality); *McNally* v. *Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976) (finding no infringement of fair trial, privacy rights; assuming without deciding availability of *Bivens* cause of action); *Wounded Knee Legal Defense/Offense Committee* v. *F.B.I.*, 507 F.2d 1281, 1284 (8th Cir. 1974) (sixth amendment right to effective assistance of counsel, jurisdiction).

Ninth Circuit: *Jacobson* v. *Tahoe Regional Planning Agency*, 558 F.2d 928, 936, 941-42 (9th Cir. 1977) (separate causes of action available under fifth amendment due process clause and fifth amendment just compensation clause); *Bennett* v. *Campbell*, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of *Bivens* claims under fourth and fifth amendments; suggesting the availability of damage actions for deprivations "of constitutional rights"); *Mark* v. *Groff*, 521 F.2d 1376, 1378 and n. 1 (9th Cir. 1975) (fifth, sixth and eighth amendments, jurisdiction; reserving question of remedy); *cf. Gray* v. *Union County Intermediate Education District*, 520 F.2d 803, 805 (9th Cir. 1975) (finding no denial of rights; apparently assuming

With respect to the due process clauses of the fifth and fourteenth amendments, the overwhelming weight of authority, particularly at the Court of Appeals level, holds that constitutional rights may be vindicated through implied causes of action for money damages.[7] And as the en banc majority is also aware, numerous panels of this circuit have adhered to *Bivens*' policy of access, finding jurisdiction under 28 U.S.C. § 1331 for district courts to entertain implied causes of action for damages under the due process clauses of the fifth and fourteenth amendments.[8] Nevertheless, taking Ms. Davis' allegations as true, the en banc court today chooses to deny a right of action to the victim of as blatant a case of gender-based discrimination as is within my experience on this court.[9]

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availability of cause of action for backpay and damages for violation of first amendment and due process rights).

Tenth Circuit: *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926 (10th Cir. 1975) (equal protection and due process, jurisdiction; favorable dicta on cause of action); *Kite* v. *Kelley*, 546 F.2d 334, 337 (10th Cir. 1976) (first, fourth, fifth, and ninth amendments; finding jurisdiction but denying relief on vicarious liability claim).

District court cases are collected in Lehmann, *supra* n. 3. at 566-68 and nn. 226-229.

Thus, seven circuits have implied causes of action directly from constitutional amendments other than the fourth. Of these, five circuits have implied causes of action from the due process clauses of the fifth and fourteenth amendments. In addition to these five, at least three circuits have found *Bivens* claims under the due process clauses sufficiently substantial to ground federal jurisdiction under 28 U.S.C. § 1331 and have commented favorably upon implication of damage actions from these clauses. Still another circuit, in implying a cause of action under the first amendment, has relied on cases implying causes of action from the fifth amendment. Today the Fifth Circuit becomes the first circuit to reject definitively the availability of a *Bivens* cause of action in any context other than a fourteenth amendment action against a municipality.

[7] See cases cited in majority opinion, *supra*, at n. 4, and note 6 *supra*.

[8] *See* majority opinion, *supra*, at p.——, slip op. at p. 3509, and cases cited therein.

[9] Gender-based discrimination may violate the due process clause of the fifth amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Weinberger* v. *Wisenfeld*, 420 U.S. 636, 638, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514

Would that the Fifth Circuit had instead chosen to add one more jewel to its liberating diadem of pioneering jurisprudence. Still, the en banc court is correct in noting that despite the overwhelming weight of authority, choice is not foreclosed. The Supreme Court has invited judicial creativity, and Judge Clark, with his customary care and acuity, has authored as persuasive a rebuttal of this authority as might be imagined. Yet I remain unpersuaded. The test is *Bivens*. I offer here a reading of that case which I believe to be more consistent with its holding and more harmonious with its spirit than the reading offered by the majority.

III.

If I understand the majority's treatment of *Bivens*, the crux of its reasoning is that the Supreme Court was able to imply a damages remedy for violation of the fourth amendment by federal officers only because Congress had not spoken. The Supreme Court's indication of a possible willingness to accord some deference to an "explicit congressional declaration" of preference for an alternative remedy "equally effective in the view of Congress," *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005, is apparently taken to mean that a cause of action for damages is not "part and parcel of the underlying constitutional right," therefore "is not wholly of constitutional dimensions," and thus is "subject to the will of the Congress for the substitution of other remedies, *so long as the minimum demands of the Constitution are met.*" (Emphasis added). Majority opinion, *supra*, at pp. ——, slip op. at pp. 3510-3511.

What follows from this perspective is that the implication of a cause of action from the Constitution is initially to be governed, or at least guided, by the standards applicable to implication of remedies from statu-

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(1975), *quoting Schneider* v. *Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964). *See also Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Wisenfeld*, *supra* (citations omitted).

tory enactments, as elucidated by the Supreme Court in *Cort* v. *Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Only if a cause of action for damages satisfies these statutory standards, or if* "a damage action *is* indispensible *to the effectuation of the fifth amendmnet,*" *(emphasis added), majority opinion,* supra *at p. ——, slip op. at p. 3514, may a damage remedy be implied.*

I believe that proper application of the *Cort* analysis to a constitutional claim would justify implication of a damages remedy directly from the fifth amendment on the facts of this case. But my disagreement with the majority is a more fundamental one: I believe the premises underlying the analytical structure proposed by the majority are irreconcilable with the Supreme Court's opinion in *Bivens.*

In my view *Bivens* is a decision of constitutional magnitude. The fundamental inquiry in *Bivens* was whether the Constitution mandates *some* remedy for a petitioner whose constitutional rights have been violated. Only after finding that *some* remedy is constitutionally compelled did the Supreme Court go on to consider which remedy is *appropriate*—not necessary in itself—in the circumstances of a given case to redress the constitutional violation:

> [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

403 U.S. at 392, 91 S.Ct. at 2002, citing, *inter alia*, *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). The Constitution creates a right in the

plaintiff; the courts are to adjust their remedies to accord relief.

That the fourth amendment might be enforced by other plaintiffs, in other contexts, through mechanisms other than a damage action, was passed over by the *Bivens* majority as of little moment. What was significant to the Court was the remedial plight of the petitioner in the case before it. As stated by Justice Harlan, concurring:

> [I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. . . . [A]ssuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

Id. at 409-10, 91 S.Ct. at 2011-12. On the need to provide an effective remedy, the Court was unequivocal:

> [I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done.

Id. at 396, 91 S.Ct. at 2004, citing *Bell* v. *Hood*, 327 U.S. at 684, 66 S.Ct. at 777. In this respect, provision of a damage remedy "should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395, 91 S.Ct. at 2004 (citations omitted).

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his [constitutional] rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

Id. at 397, 91 S.Ct. at 2005 (citations omitted). Responding to the suggestion that a more stringent test should govern the grant of damages in constitutional cases, Justice Harlan stated:

> These arguments . . . seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.

Id. at 407, 91 S.Ct. at 2010 (concurring opinion) (footnote omitted).

The en banc majority's apparent conclusion that the *Bivens*-damage action is of non-constitutional dimensions seems to be tied to its assumption [10] that a cause of action not "part and parcel of the underlying constitutional right" is merely federal common law of less than constitutional dimensions. But to state that the Court may accord some deference to a congressional choice of remedy "equally effective in the view of Congress" is only to admit the possibility of *substitutes* for the damage remedy, not to say that Congress may eliminate all means of vindication of a federal constitutional right.[11]

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[10] This assumption is speculative on the basis of *Bivens* itself. *See* Harlan, J., concurring:

> I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

Id. at 407 n. 7, 91 S.Ct. at 2010.

[11] Professor Dellinger suggests that the passage in *Bivens* finding no "explicit congressional declaration" and rejecting "formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment." 403 U.S. at 397, 91 S.Ct. at 2005, might be read

> "affirmatively . . . to describe the conditions under which the Court should defer to congressional judgment even though a remedy may be substantively bound to constitutional provisions."

Dellinger, "Of Rights and Remedies: The Constitution as a Sword." 85 Harv.L.Rev. 1532, 1548 n. 89 (1972). Thus, where these conditions have not been met—where Congress has not provided an effective alternative remedy—there is no occasion for deference to congressional judgment. The courts must therefore "adjust their remedies so as to grant the necessary relief." 403 U.S. at 392, 91 S.Ct. at 2002, *quoting Bell* v. *Hood.*

Had Congress chosen to provide a remedy alternative to money damages to those "in Davis' shoes," this court would be correct in according that choice deference, though even in those circumstances,

> [t]he ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review.[12]

Perhaps the clearest statement by the Supreme Court itself on this subject is found in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966):

> Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

Id. at 490-91, 86 S.Ct. at 1636.

The opinion of the en banc majority totally fails to address the core inquiry commanded by *Bivens*. Apart from a passing reference not applicable to the plight of Ms. Davis that "[a] plaintiff might still seek equitable relief where the employer remained in office," majority opinion, *supra*, at p. ——, slip op. at p. 3514, the en banc court nowhere considers whether *some* remedy must be

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[12] *Dellinger, supra* n. 11. I find nothing in Professor Monaghan's provocative article, cited by the majority, inconsistent with this conclusion. Monaghan, "Foreword: Constitutional Common Law," 89 Harv.L.Rev. 1 (1975): "I think that *Bivens* is an explicit recognition that the constitutional guarantee embraces a right of action . . . which is enforceable by any appropriate remedy including damages . . . ." *Id.* at 24 n. 125. *See generally* Cox, "The Role of Congress in Constitutional Determinations," 40 Cincinnati L.Rev. 199, 247, 261 (1971); Burt, "*Miranda* and Title II: A Morganatic Marriage," 1969 Sup.Ct.Rev. 81.

available to vindicate fifth amendment rights. Where is the sensitivity that moved Justice Harlan to observe "For people in Bivens' shoes, it is damages or nothing"? 403 U.S. at 410, 91 S.Ct. at 2012. The majority essentially ignores the constitutional predicate for the *Bivens* decision, i.e., that there be a remedy, and reformulates the inquiry in a far more stringent fashion: a cause of action for damages will be implied only if damages, specifically, are in some absolute sense *necessary* to effectuate the constitutional mandate. The court then proceeds to find a damage remedy unnecessary while simultaneously acknowledging that constitutional deprivations of the sort suffered by Ms. Davis "would remain inactionable," and that Ms. Davis "may be left without a remedy for sex discrimination in employment" unless Congress chooses to create one. Majority opinion, *supra*, at p. ——, slip op. at p. 3514.

In short, the majority opinion errs because it answers the wrong question. If Congress had provided an alternative remedy and explicitly excluded a remedy in damages, the appropriate inquiry would indeed be whether a damage remedy as such is necessary, nevertheless, to effectuate the constitutional guarantee, and therefore constitutionally required. But where, as here, *no* alternative remedy has been made available, that inquiry is simple irrelevant. In leaving Ms. Davis without any remedy, the majority's approach seems to me an utter negation of *Bivens* in both letter and spirit.

A further result of the majority's analytic approach is that its opinion never comes to terms with the appropriateness of a remedy in damages as opposed to alternative remedial devices which the *court* might make available. The majority's unelaborated suggestion of "equitable relief" is obvious to those constitutional values, critically implicated in this case, underlying the speech or debate clause and the doctrine of separation of powers. Congress has spoken specifically to its views on the nature of the working relationship between Congressmen and their personal staffs by classifying employees like Ms. Davis as removable "at any time . . . with or without cause." The Supreme Court has accorded congressional staffers speech

or debate clause protections in certain circumstances, recognizing that staffers may act as congressional alter egos in the performance of certain legislative tasks. *Gravel* v. *United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). *See Davis* v. *Passman*, 544 F.2d at 877-81 (panel opinion). Apparently the majority feels these values can be better effectuated, consistent with the requirements of the fifth amendment, not by actions for damages but by injunctive orders requiring Congressmen to employ particular individuals. This is not the occasion for a definite statement on the circumstances which might justify implication of a private action for equitable relief to vindicative fifth amendment rights.[13] But on the facts of the case before us, I would have thought that such "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, 91 S.Ct. at 2005, are more germane to the implication of equitable relief than to implication of an action for damages.

Similarly, it would seem to me that the special problems of congressional immunity under the speech or debate clause and the doctrine of separation of powers render this case uniquely appropriate for adjudication in the federal courts under a federal cause of action. Much of the *Bivens* opinion concerns the difficulties and inadequacies of state court or state law adjudications of federal immunities in the context of constitutional claims; that reasoning is, if anything, even more powerful with respect to the issues presented here.

The majority's abiding fear seems to be "the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings" [14] by project[ing] the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious

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[13] *See, e.g., Brown* v. *General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 1965 and n.7, 48 L.Ed.2d 402 (1976), and note 2 *supra*.

[14] The majority never indicates how Ms. Davis' claim might be "otherwise redressable in state courts or administrative proceedings."

injury inflicted by persons acting under color of federal laws . . ." and "extend[ing] federal jurisdiction to cover all state action tort claims . . . without regard to diversity of citizenship, amount in controversy or other present statutory limitation." Majority opinion, *supra*, at pp. ——-——, slip op. at pp. 3514-3515. The majority refuses "to take even a first step down the slippery slope," "[g]iven these consequences and our inability to construct a plausible measure of acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged . . . ." *Id.* at p. ——, slip op. at p. 3515. A like contention was raised in *Bivens*. Justice Harlan had this response:

> [T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interest of stockholders defrauded by misleading proxies. See *J. I. Case Co.* v. *Borak*, *supra*. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 410-11, 91 S.Ct. at 2012 (concurring opinion). Even on the majority's own premises, I am considerably more confident in the ability of courts to discern, in a careful and focused manner attentive to the facts of the case before them, when the pendulum was swung too far and how its course may be corrected. I do not believe that the majority's approach to the facts of this case is such a focused inquiry; nor do I believe the pendulum has swung too far here. We have before us no illusory or fabricated procedural due process claim which raises the specter of wholesale importation of traditional state tort law actions into the federal courts, but a discrete claim of discrimination on the basis of gender in

violation of the equal protection guarantees of the federal Constitution, in a context particularly appropriate to adjudication in a federal forum. This is precisely the sort of case mete for judicial determination and susceptible to the application of traditional judicial standards.

The majority's invocation of the twin horsemen of the contemporary judicial apocalypse, the floodgate and the slippery slope, and its refusal to act in the spirit of *Bivens* "until the Supreme Court answers the open question," majority opinion, *supra*, at p. ——, slip op. at p. 3515, seem to me not an example of judicial restraint but of judicial abdication. I would prefer the approach taken by the *Bivens* majority in its quotation of one of the fundamentals of our constitutional jurisprudence:

> The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury,

403 U.S. at 397, 91 S.Ct. at 2005, *quoting Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 163, 2 L.Ed. 60 (1803), and by the Fourth Circuit in extending *Bivens* to fifth amendment due process claims:

> The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.

States Marine Lines, Inc. v. *Shultz*, 498 F.2d 1146, 1157 (4th Cir. 1974).

I had not thought the fifth amendment was lodged behind an iron curtain, separating it from the rest of our constitutional protections. That the windows may open wide and the winds of freedom sweep through is no reason

for rejecting the Davis claim. Are we to develop a calculus of constitutional access, granting rights to one out of seven persons deprived, one out of two, one out of a thousand, in order to control our docket? One wonders what would have happened had such constitutional parsimony pervaded our history. Hopefully the courthouse door, too often closed in recent years, will soon swing open again, and liberty shall ring forth once more from the halls of justice.

IV.

Much of the majority's discussion is devoted to an analysis of the *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) factors governing implication of causes of action from federal statutes. I have already indicated why this analysis seems somewhat beside the point given the constitutional mandate that *some* remedy be available to vindicate constitutional rights. Given that the court has adopted this approach, however, it is incumbent on me to respond to the majority's application of the *Cort* criteria.

I note initially that the majority makes no attempt in its *Cort* analysis to assess the relevance of the fact that Ms. Davis is seeking to vindicate a right granted by the Constitution itself, and thus beyond the ability of Congress to eliminate, rather than a statutory right of the sort Congress giveth and may take away. While recognizing that the *Cort* statutory analysis "cannot be applied [to the Constitution] in precisely the same way," the majority is content to proceed on the basis of a prior statement by this court (in a statutory case) that the *Cort* "factors [are] relevant and worthy of consideration." Majority opinion, *supra*, at p. ——, slip op. at p. 3511, *quoting Olsen* v. *Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

I think it is possible to do better. By recognizing the constitutional context within which it is here applied, the *Cort* v. *Ash* style of analysis may be turned to productive use in the sphere of constitutional common law. Properly applied, the *Cort* factors may serve to illuminate the choice of an appropriate remedial mechanism to vindicate

constitutional rights. *Cort* thus guides the determination, not of *whether* to imply *any* remedy, but of *which* remedy it is appropriate to recognize. I believe that such a contextually sensitive application of the *Cort* criteria supports the panel decision in this case, and it is with this perspective that I turn to the majority's *Cort* analysis.[15]

In *Cort* v. *Ash*, the relevant portion of which concerns whether a corporate stockholder may secure derivative damage relief from corporate directors under 18 U.S.C. § 610 for corporate violations of the federal election campaign laws, the Supreme Court declined to imply a private cause of action for damages because

> implication of such a federal cause of action is not suggested by the legislative context of § 610 or required to accomplish Congress' purposes in enacting the statute.

422 U.S. at 69, 95 S.Ct. at 2084. The Court articulated four factors to guide its analysis in reaching this conclusion. The first factor has been central to all implication cases, from the first statutory implication decision in which it was originally formulated. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916), through to *Bivens* and more recent statutory cases: "is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?" 422 U.S. at 78, 95 S.Ct. at 2088, citing *Rigsby*, *supra*, 241 U.S. at 39, 36 S.Ct. 482. As the Supreme Court explained, "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff," citing *Bivens*, "or a pervasive legislative scheme governing the relationship between the

[15] I recognize that the majority's analysis proceeds from a different perspective. Were the fifth amendment simply a statutory enactment, there can be no doubt that a congressional determination to deny a private right of action for damages would be decisive under *Cort*. That conclusion, to the extent it embodies the majority's analytic approach, seems to me quite unshakeable but thoroughly irrelevant to this case.

plaintiff class and the defendant class in a particular regard." 422 U.S. at 82, 95 S.Ct. at 2090 (citation omitted).

The en banc opinion in the instant case appears to acknowledge that "the fifth amendment right to due process certainly confers a right upon Davis." Majority opinion, *supra*, at p. ——, slip op. at p. 3511. There can be no suggestion that the fifth amendment's protection of Davis is "at best a subsidiary purpose" of the constitutional guarantee. *Cf. Cort, id.*, at 80, 95 S.Ct. at 2089. With respect to this first, and I think predominant, factor, that is all that *Cort* requires. Nor is more required by *Bivens*. That decision was explicit in the role of the fourth amendment:

> It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.

403 U.S. at 392, 91 S.Ct. at 2002.

I cannot understand why the equal protection component of the fifth amendment due process clause does not equally guarantee to all citizens of the United States, including Ms. Davis, the absolute right to be free from unconstitutional job discrimination on the basis of sex carried out by virtue of federal authority.[16]

It is with respect to *Cort's* second factor, "legislative intent, explicit or implicit, either to create such a remedy or to deny one", 422 U.S. at 78, 95 S.Ct. at 2088, that my disagreement with the majority is at its sharpest. In *Cort*, as in other statutory implication cases, the underlying premise is that Congress may explicitly create or deny a private remedy; what Congress gives, it may take away. There is no underlying right which is

[16] It is frankly beyond my ken to understand first, the source of the majority's imputation of an additional hurdle of some degree of required specificity, or second, how the equal protection component of the fifth amendment is in this respect less specific than the fourth amendment. *See* majority opinion, *supra*, at p. , slip op. at 3511.

constitutionally inviolate. In a statutory case, therefore, the implication question is whether congressional intent to create or deny a remedy is best effectuated by judicial implication of a cause of action. Correspondingly, the en banc majority seems to read *Bivens* as "recogniz[ing] that congressional intent to create a remedy must guide a court in determining *whether* to imply a remedy from provisions of the Constitution." (Emphasis added). Majority opinion, *supra*, at p. ——, slip op. at p. 3511. I find no such recognition in *Bivens* and believe this reading, as applied by the majority to deny Ms. Davis any remedial mechanism, is simply irreconcilable with *Bivens*. As pointed out in Section III of this dissent, the *Bivens* Court addresses the relevance of congressional action only *after* it has determined that some means of redress is constitutionally mandated; the voice of Congress is relevant, if at all, only in guiding the *court* in its determination as to whether damages provide an appropriate remedy. There is *no* suggestion in *Bivens* that Congress can negate the existence of *every* remedy which might vindicate a constitutional right, only an indication that the Court might accord some deference to an "explicit congressional declaration that persons injured by a federal officer's violation" of a constitutional right "may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." 403 U.S. at 397, 91 S.Ct. at 2005.

The en banc majority does not—and cannot—state that Congress has provided such an alternative remedy. Instead, the court tries to draw support for its position from the fact that "Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position." Majority opinion, *supra*, at p. ——, slip op. at p. 3511. Here the confusion between constitutional and statutory implication is most evident. Given the constitutional mandate for *some* effective remedy, the second *Cort* factor, legislative intent to deny any remedy, is simply irrelevant to this case. *See* Dellinger, *supra* n. 11, at 1548-49.

Much the same criticism can be levelled against the en banc majority's application of the third *Cort* criterion, consistency with the underlying purposes of the legislative scheme. The majority correctly notes that Congress, in providing statutory relief from employment discrimination under Title VII for employees in the private sector and in other spheres of government service, *see* majority opinion, *supra*, at pp. ————, slip op. at pp. 3511-3512, has carefully avoided furnishing relief of any sort to many of its own employees. By providing an administrative—judicial mechanism for ensuring the rights of *covered* employees, Title VII may well constitute "an explicit congressional declaration" that covered employees "must be remitted to another remedy, equally effective in the view of Congress." Indeed, the Supreme Court has held that for federal employees covered by the complex and systematic remedial scheme of Title VII, that statute provides the exclusive judicial remedy. *Brown* v. *General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).[17] Nothing similar can be said about congressional employees in the position of Ms. Davis, who are statutorily excluded from the coverage of Title VII. Congress has provided *no* remedial

[17] In *Brown*, the Court did not reach the constitutional issue of whether, absent the applicability of Title VII or an alternative statutory remedy, federal employees would be without any means to redress discriminatory treatment "that backpay or other compensatory relief," *id.* at 826, 96 S.Ct. at 1965; it merely noted, based on legislative history, that Congress desired a remedy to be available and reasonably perceived an absence of effective remedies then (in 1972) in existence. The two cases cited by the Court as substantiating the reasonableness of Congress' perception, *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934, 90 S.Ct. 941, 25 L.Ed.2d 115 (1970), and *Blaze* v. *Moon*, 440 F.2d 1348 (5th Cir. 1971), both denying the availability of damages, were decided prior to the Supreme Court's seminal decision in *Bivens*. Obviously, nothing in *Brown* determines that Congress may negate the existence of a cause of action to vindicate a constitutional right without providing an alternative and equally effective remedy. *See Davis* v. *Passman*, 544 F.2d at 874-76 (panel opinion). Congress did provide an acceptable alternative for those employees covered by Title VII. It provided nothing for Ms. Davis or those in her position.

mechanism for them. Such employees are in no sense bound up in the statutory system of protections created by Congress, and I cannot perceive how according Davis a vehicle to enforce her constitutional rights would detract from or be inconsistent with the operation of the statutory scheme within the sphere of its application. I am also hard put to understand the en banc majority's suggestion that a constitutional cause of action would "deal more generously with those in Davis' position," majority opinion, *supra*, at p. ——, slip op. at p. 3512, than covered federal employees are dealt with under Title VII. It is true that if accorded a *Bivens* action, Davis could sue Representative Passman for damages in his individual capacity, while a Title VII plaintiff could not. But Title VII, for those to whom it applies, lowers the bar of sovereign immunity to permit a back pay award, together with possible equitable relief, directly against the United States. It also affords the possibility of relatively quick and inexpensive relief at the administrative level. This seems to me no less favorable than a possible recovery against a former congressman. It is unnecessary to speculate here on whether extension of Title VII to currently non-covered congressional employees would be the most appropriate mechanism for protection of constitutional rights or whether a remedial mechanism more carefully tailored to the particularities of congressional employment relationships would be preferable; I note only that Congress has done neither.[18] In these circumstances, the problem confronting us is precisely analogous to that before the *Bivens* court, and the re-

[18] The choice properly before this court is one between alternative remedies. No party before us has suggested that we undertake to fashion a remedy precisely analogous to that provided by Title VII, if indeed such a remedy is within our judicial power. While this court may, and should, consider congressional policies in choosing the appropriate remedy, we should not refrain from adopting such judicial remedies as are available and meaningful to the plaintiff merely because Congress has adopted a constitutionally sufficient but different remedial scheme for other employees. It is no answer that the only available judicial remedy might be more favorable than the remedy fashioned by Congress if the only alternative to a more favorable remedy is no remedy at all.

sponse should be the same, to make available "a particular remedial mechanism normally available in the federal courts,"

403 U.S. at 397, 91 S.Ct. at 2005, recalling that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

403 U.S. at 392, 91 S.Ct. at 2002, *quoting Bell* v. *Hood*, 327 U.S. at 684, 66 S.Ct. 773. For ours is the "particular responsibility to assure the vindication of constitutional interests . . . ." 403 U.S. at 407, 91 S.Ct. at 2010 (Harlan, J., concurring).

I am also unpersuaded by the majority's suggestion that while fourth amendment violations "occur in a well-defined setting familiar to the courts," [18a] damage reme-

[18a] The majority apparently also finds, in *Bivens'* responsiveness to "the particular difficulties presented in enforcing the guarantees of the fourth amendment," in particular, the "hostility of law enforcement officials to the restraints of the fourth amendment," majority opinion, *supra*, at p. ——, slip op. at pp. 3512-3513, something akin to this third *Cort* factor. The inference the majority draws from this discovery, apparently that the *Bivens* action is uniquely necessary in the fourth amendment context, is one I am unable to follow. For what seems to me decisive in *Bivens* is the fact that whatever remedies were available to others whose fourth amendment rights had been violated, such remedies were meaningless to Bivens himself; thus, the existence of those other remedies was irrelevant to the Court in its decision to create a cause of action to vindicate the rights of the plaintiff in the case before it. Accordingly, there is no need to speculate on the comparative hostility of law enforcement officials to the restraints of the fourth amendment and of Congressmen to the possibility of being answerable in damages for violation of their employees' equal protection rights.

In this respect, it is worth noting that an *amicus* brief was submitted in this case by signatories of the House Fair Employment Practices Agreement, including both Members of Congress and congressional employees. That Agreement provides, *inter alia*, that the signatories will not discriminate against an employee or applicant for employment on the basis of sex. *Amici* "see absolutely no harm to the legislative process if Members of Congress are required to conform to constitutional standards when dealing with their employees." Amicus Brief at p. 3. *See also* 5 U.S.C. § 7151.

dies for due process violations in general, and equal protection claims in particular, are somehow not "judicially manageable." *See* majority opinion, *supra*, at p. ——, slip op. at pp. 3512-3513. As the Court observed in *Bivens*, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395, 91 S.Ct. at 2004 (citations omitted). I have little doubt that the experience of judges in dealing with employment discrimination claims "supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion" of equal protection rights of the sort asserted here. *Cf.* 403 U.S. at 409, 91 S.Ct. at 2011 (Harlan, J., concurring). The en banc court's analysis of this factor, to the extent it is not reducible to another floodgates argument, seems to me an argument against the validity of *any* means of vindication of equal protection rights, not simply against the choice of damages as an appropriate remedial mechanism. With respect to this factor as well as the preceding one, the en banc majority's mechanical application of the *Cort* statutory criteria as somehow "relevant and worthy of consideration" fails to consider the distinctive features of implication of rights directly from the Constitution and comes to a result contrary to that commanded by *Bivens*.

This is also regrettably true in the court's application of the fourth and final *Cort* factor, whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95 S.Ct. at 2088. The en banc majority's apparent conclusion that this is an apt characterization of a claim by a congressional employee working in a congressional office building alleging sex discrimination violative of the fifth amendment to the United States Constitution by a member of Congress seems to me a novel view of the operation of "Our Federalism." The majority, intent on avoiding the horros, real or imagined, of a flood of procedural due process

claims carrying along traditional state tort actions, here as elsewhere never comes to consider the facts of the case before it.[19]

Nor is this case in any sense an attempt to end-run possible statutory limitations of § 1983, unlike the only two Court of Appeals cases cited by the en banc majority as declining to imply *Bivens* actions from the due process clauses. *See* majority opinion, *supra*, at n. 4. In *Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977), the First Circuit refused to imply a right of action for vicarious liability against a municipality under the fourteenth amendment in the teeth of Supreme Court decisions foreclosing municipal liability under § 1983. In distinguishing the result in *Bivens* the *Kostka* court noted that the plaintiffs before it "here have available to them a right of action which is measured by constitutional standards: § 1983," *Id.* at 42, and resisted the attempt to impose vicarious liability on a municipal "deep pocket defendant", *id.* at 41, given "something akin to an explicit Congressional determination that political subdivisions are not to be held liable in damages" when "municipal employees violate individuals' constitutional rights." *Id.* at 43. The court suggested that "the existence of a statutory remedy which is designed to implement the constitutional guarantee may itself render the *Bivens* analysis inappropriate," *id.* at 42, and made the precise inquiry which the majority refuses to make here: "We cannot say that the remedial scheme enacted by Congress—permitting damages recoveries under limited circumstances and injunctive relief whenever there has been a sufficient prior threat of harm—does not adequately implement the constitutional guarantees, at least in cases in which there has been no municipal involvement in the wrongdoing." *Id.* at 44.

[19] The en banc majority quotes *Paul* v. *Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), to the effect that "the range of interests protected by procedural due process is not infinite." *Id.* at 709, 96 S.Ct. at 1164, *quoting Board of Regents* v. *Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). *Paul*, of course, rejected "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701, 96 S.Ct. at 1161 (emphasis added). Without engaging in any polemical discussion about the wider implications of *Paul*, we note first, that Ms. Davis' damages include a loss of employment; second, that her claim is bottomed on equal protection and not on procedural due process; and third, that vindication of Ms. Davis' fifth amendments claim is in no way inconsistent with the Court's observation in *Paul* that the fourteenth amendment "did not alter the basic relation between the States and the national government." *Id.* at 700, 96 S.Ct. at 1160, *quoting Screws* v. *United States*, 325 U.S. 91, 108-09, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495 (1945).

Kostka is in no sense inconsistent with the result urged in this dissent and is remarkably similar in its analysis to the approach advocated here. The *Kostka* court observed the Supreme Court's direction to "carefully assess the existing remedies," *id.* at 42, and to "focus on the precise remedy plaintiffs wish us to create." *Id.* at 44. The First Circuit found that Congress had created in § 1983 a statutory remedy "designed to implement the constitutional guarantee" against those individuals directly responsible for the alleged violations of Kostka's constitutional rights[20] and rested its decision on the adequacy of that remedy.[21] Congress had provided *no* remedy to redress the constitutional wrongdoing here.

[20] The court noted that qualified immunity might be available to those individuals, *id.* at 40; defendant here also claims the availability of absolute or qualified immunity. The *Kostka* court properly recognized that immunity is analytically distinct from the implication of a constitutional cause of action and should be addressed with respect to its own underlying policies. In the case at bar, to the extent the immunity issue is relevant to the choice of an appropriate remedial mechanism, the underlying policies weigh in favor of the damages relief sought here. *See* text, *supra*, at p. ——, slip op. at p. 3528.

[21] The *Kostka* court's determination that the § 1983 remedy was adequate was explicitly limited to "cases in which there has been no municipal involvement in the wrongdoing." *Id.* at 44. "Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different." *Id.* at 45. Here there can be no doubt that if wrongdoing was done, the defendant Passman was responsible for doing it.

The en banc majority, unlike the *Kostka* court, must respond to this fact; it has not done so.[22]

V.

The en banc court also expresses a fear that "implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary" and "render meaningless the power the Constitution vests in Congress under Article III, Section 1 of the Constitution to establish the jurisdictional ambits of the inferior courts it has created." *See* majority opinion, *supra*, at pp. ——, ——, slip op. at pp. 3514-3515. Once again, the mechanism of this transformation is

[22] In *Mahone* v. *Waddle*, 564 F.2d 1018 (3rd Cir. 1977), the second Court of Appeals case cited by the en banc majority, the Third Circuit faced a claim somewhat similar to that advanced in *Kostka*. The Third Circuit found that "[i]f plaintiffs prove the racially motivated deprivations of their rights which they allege, section 1981 will afford them the redress in federal court which they seek" and affirmed the district court's dismissal of fourteenth amendment claims on the basis of *Bivens*' teaching "that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on the plaintiffs' behalf." *Id.* at 1024-25 (citations omitted). Judge Garth, dissenting in part and concurring in part, argued that no fourteenth amendment cause of action could ever be asserted against a city. Judge Garth's reasoning was based in part on logic akin to the *Kostka* courts, and in part on the observation

> that the framers of the Fourteenth Amendment intended to confer upon *Congress*—not the courts—the primary responsibility for developing appropriate measures to enforce the Amendment. Section five of the Fourteenth Amendment provides that 'Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' None of the first eight Amendments contains a similar provision. *Compare Bivens* . . . (implied cause of action under Fourth Amendment); *Paton* v. *LaPrade*, 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *United States ex rel Moore* v. *Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (Fifth Amendment).

Id. at 1059. Perhaps needless to say, we find nothing in Judge Garth's observation or in the opinion of the *Mahone* majority inconsistent with the core analysis proposed in this dissent for Ms. Davis' fifth amendment claim.

more clear to the majority than it is to me; I would have thought the wording and history of 28 U.S.C. § 1331 (a), committing to the federal courts jurisdiction of actions "arises under *the Constitution*, laws, or treaties of the United States" exemplify a rather unambivalent exercise by Congress of its Article III powers.[23]

[23] The en banc majority, while referring at one point to its "affirmance on the jurisdictional ground," majority opinion, *supra*, at p. ——, slip op. at p. 3515, explicitly states elsewhere that its affirmance is based on the ground "that the law affords Davis no private right of action." *Id.* at p. ——, slip op. at p. 3508. I read the court's decision as in fact finding proper jurisdiction over this case under 28 U.S.C. § 1331(a) and proceeding to a decision on the merits, under Fed.R.Civ.P. 12(b)(6), that the due process clause of the fifth amendment does not support an implied cause of action for damages. Accordingly, jurisdiction will no longer lie in the courts of this circuit to entertain damage actions "arising under" the fifth amendment's due process clause. It is only in this sense that *Weir* v. *Muller*, 527 F.2d 872 (5th Cir. 1976), is overruled. I do not understand the court's act on today as denying the analytic soundness of *Weir's* statement that "The jurisdictional issue here is entirely separate from the [question] whether the complaint states a claim on which relief can be granted," *id.* at 873, citing *Bell* v. *Hood* and *Bivens*. *See also Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977):

> The question of subject matter jurisdiction is, of course, distinct from that whether plaintiffs have stated a claim upon which relief may be granted. So long as a claim for federal relief is not frivolous, the action arises under federal law for purposes of § 1331 and the federal court has jurisdiction to adjudicate the claim that a federal right of recovery exists. Since no . . . decision forecloses us from inferring a remedy under the Fourteenth Amendment and since *Bivens* gives the plaintiff's claim at least surface plausibility, we have jurisdiction under § 1331.

Id. at 41 n. 5 (citations omitted); *Mahone* v. *Waddle*, 564 F.2d 1018, 1022 (3rd Cir. 1977).

Thus, the court's decision today does not remove jurisdiction from the district courts to entertain *Bivens*—style claims brought under constitutional provisions other than the due process clauses. In each case, so long as the federal claim is not frivolous or barred by a decision of this Circuit or the Supreme Court, jurisdiction will lie for a particularlized inquiry, of the sort accorded the due process clause in this case, as to whether a cause of action has been stated.

VI.

As I would hope the foregoing illustrates, one need not abandon or demean technical legal analysis to uphold a right of action for damages implied directly from the due process clause of the fifth amendment. But I would be less than candid in suggesting that broader philosophical and jurisprudential concerns are not also implicated in the decision of this case. Other courts have spoken of "*Bivens*' sweeping approbation of constitutionally-based causes of action." *Brault* v. *Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975); *see also Gardels* v. *Murphy*, 377 F.Supp. 1389 (N.D.Ill. 1974). To some, *Bivens* may be an abhorrent aberrance in our jurisprudence, but to me its benevolent embrace of constitutional rights is a treasure in our judicial trove. I would not desecrate one syllable of that opinion by deviating from its high purpose.

While constitutional interpretation may be subject to ebb and flow, I have never understood the task of the federal judiciary to be the damming—or damning—of rights that spring from that noble document. Courts are not engineers floodgating constitutional rights. The Supreme Court has spoken, definitively, on the existence of an action for damages flowing directly from the fourth amendment. While judicially self-executing constitutional rights may be exiguous, I find nothing in logic, history, or precedent that directs the building of a floodgate between the fourth amendment and the fifth. On examining the constitutional blueprints I, like the majority, find a right embodied in the fifth amendment; I unlike the majority, would allow that right to be vindicated. If vindication is to be denied, and the *Bivens* landmark washed away in a new constitutional downpour, I would prefer that the cloudburst come not from us, but from the Supreme Court on high. Like Noah, who waited forty days and forty nights, I have faith that the rainbow will finally emerge.[24]

[24] I am reinforced in my faith by the undeniable fact that the two-by-two ascent into the ark was in conformity with equal protection norms

Congress in its wisdom may provide a mechanism for enforcement of a constitutional right, and that mechanism, if effective, is entitled to some measure of judicial deference. But congressional disinclination to provide a means of enforcement does not—cannot—mean that a constitutional right is obliterated. Statutory actions may give breath to constitutional rights, but congressional inaction cannot suffocate them. In the case at hand, Congress has provided no remedy; therefore, the words of the Constitution must be our guiding star. We must not be misdirected by fear of losing our way in some celestial darkness in the limitless expanse of constitutional space. Not legal science but legal astrology limits *Bivens*' applicability to the fourth amendment, severing the cusp between the fourth and the fifth solely in accordance with the motions of our docket. Were crowded dockets to be our gyroscopes, courts might routinely strip litigants of their constitutional rights out of fear that others might follow their judicial path. I fear that is the slippery slope my brethren embark upon today.

In *Bivens* the Court founded a cause of action for damages directly on the fourth amendment. There is no reason to believe the fifth amendment stands in an inferior position to the fourth. The fifth amendment is constitutionally prime and in constitutional mathematics shares a common denominator with the fourth: the obligation of the federal judiciary "to assure the vindication of constitutional interests." If *Bivens* be a jurisprudential thorn or sport, let the Supreme Court pluck it out. Those of us who sit in a lower judicial caste need not attempt this extirpation.

I have given myself the *Allen* charge. Distasteful as it is to me, I cannot find it possible to yield my conscience to the preponderant majority, respectful as I am of my brothers' intellect, their integrity, their dedication and their loyalty to constitutional privileges. In sorrow I mourn their error.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1977

No. 75-1691

D.C. No. CA-74745

SHIRLEY DAVIS, PLAINTIFF-APPELLANT

versus

OTTO E. PASSMAN, CONGRESSMAN OF THE UNITED STATES, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Louisiana

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Before BROWN, Chief Judge, JONES, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, *Circuit Judges.*

JUDGMENT ON REHEARING EN BANC—
April 18, 1978

This cause came on to be heard on defendant-appellee's petition for rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion and judgment of the panel of this Court of January 3, 1977 is reversed; and that the judgment of the said District Court is hereby affirmed in part and vacated in part;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JONES, Circuit Judge, concurring specially.

RONEY, Circuit Judge, concurring specially.

GOLDBERG, Circuit Judge, with whom, BROWN, Chief Judge, joins, dissenting.

ISSUED AS MANDATE: MAY 10, 1978

SUPREME COURT OF THE UNITED STATES

No. 78-5072

SHIRLEY DAVIS, PETITIONER

v.

OTTO E. PASSMAN

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and the petition for writ of certiorari be, and the same is hereby, granted.

October 30, 1978

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Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October, 1978

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

RESPONSE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent, Otto E. Passman, having been requested by the Court by letter of September 11, 1978, to respond to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner, Shirley Davis, hereby files this response in opposition and prays that the Petition for a Writ of Certiorari be denied.

QUESTIONS PRESENTED

1. Whether a former Congressional employee in a non-competitive position has a cause of action under the fifth amendment to the United States Constitution for money damages against a former Congressman for an alleged discriminatory discharge.

2. If so, whether the Speech or Debate Clause of the United States Constitution and related issues involving considerations of political question non-justiciability and separation of powers bar recovery on the basis that Congressional personnel actions are thereby cloaked with immunity from interference by the judiciary.

THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CORRECT AS TO THE FIFTH AMENDMENT ISSUES IN THIS PARTICULAR CASE AND DOES NOT WARRANT CONSIDERATION BY THIS COURT.

The holding of the United States Court of Appeals for the Fifth Circuit is a narrow holding which arises from exceedingly unique and limited facts, which, when viewed reasonably, does not essentially conflict with other decisions of the U.S. Circuit Courts of Appeals, and does not have the import to warrant consideration by this Court by the grant of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit held that an action for money damages against a former Congressman based upon allegedly discriminatory discharge is not implied from the Due Process Clause of the Fifth Amendment of the Constitution. This holding was partially predicated upon an analysis of the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination" found in Section 717 of Title VII of the Civil Rights Act of 1964,[1] as amended in 1972. And, indeed, this case is unique in that the right to damages is claimed by one who occupies a position specifically exempted from coverage of Title VII and who has historically been subject to discharge with or without cause - a federal employee in a non-competitive position on a Congressman's personal staff. In this case, unlike other actions based upon a Bivens[2] rationale, Congress has spoken rather clearly in its creation of an exclusive remedial scheme and has determined that employees such as petitioner herein in the non-competitive units of legislative (and judicial) branches shall not have the rights available to other federal employees to participate in that scheme. The Fifth Circuit noted that "Congress cannot have intended to deal

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[1] Section 717 of the Civil Rights Act prohibits discrimination only ". . .in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service." (Emphasis supplied.)

[2] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

ore generously with those in Davis' position, from whom it eliberately withheld protection."[3] Indeed, Congress had in ears past enacted 2 U.S.C.A. §92 which provided for removal of congressman's personal staff "at any time with or without ause."

The point to be emphasized here is that the Fifth ircuit's holding is so narrow and so tightly bound to such unique acts involving the will of Congress that the decision does not trike a blow at the evolutionary process of Bivens as it is eveloping in various Circuit Courts of Appeals. Respondent, herefore, respectfully submits that this case is not the proper ehicle for this Court to use for an articulation of the limits of Bivens cause of action. And indeed, this case affects only congressional employees in the non-competitive service whose llegedly discriminating employers are not in office. . ."[4] Further, he Fifth Circuit specially noted that:

> "Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief when the employer remained in office. . ." (Emphasis supplied)[5]

he clear impact of this case thus runs only to former non-ompetitive service congressional employees whose employers are o longer in office and who seek money damages over their removal. he Fifth Circuit was not called upon to delineate the rights of ongressional employees against congressmen still in office and did ot do so other than to suggest that equitable relief was available hen the employer was still in office. Thus, consideration by this ourt is not warranted as the affected parties are few.

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[3] See Appendix A, page 6. (References are made herein to he appendices attached to the Petition for a Writ of Certiorari)

[4] Appendix A at 8.

[5] Appendix A at 8.

In view of the clear Congressional mandate to thus exempt non-competitive congressional employees, it is submitted that the Fifth Circuit could not have properly found otherwise on these very narrow facts than to deny money damages. The Fifth Circuit has by its decision placed a limitation on Bivens-type actions under the fifth amendment insofar as the rights to damages of former non-competitive service employees of former congressmen are concerned. Such a limitation, on these facts, in the correct result in this case for the reasons set forth above and in the Fifth Circuit's opinion.

Moreover, even if one were favorably disposed toward implying fifth amendment causes of action for damages under the Bivens rationale, the result in this case is a proper delineation of the limits of that rationale in view of the peculiar facts of this case and the clear intent of Congress regarding the status of non-competitive service congressional employees and the other factors as expressed by the Fifth Circuit in its analysis. Accordingly, for this reason, consideration by this Court is not warranted.

The Fifth Circuit by its decision en banc in effect refused to take responsibility upon the federal judiciary for policing the internal personnel problems of the Congress, another branch of the federal government. Respondent submits that this non-interference is a salutary result which should remain undisturbed. It must not be forgotten that this is not the typical Bivens-based alleged fifth amendment action - this action seeks to involve the Courts in the internal employment relationships of a coordinate branch when that branch has already substantively defined the rights of the parties.

Respondent submits that the decision below was correct and that for the foregoing reasons, the petition for certiorari should be denied.

HE SPEECH AND DEBATE CLAUSE AND THE RELATED ISSUES OF NON-JUSTICIABLE POLITICAL QUESTION AND SEPARATION OF POWERS PROTECT ESPONDENT FROM JUDICIAL INQUIRY INTO THE HIRING AND FIRING OF ONGRESSIONAL STAFF MEMBERS.

The rehearing en banc was ordered by the Fifth Circuit the basis of Respondent's motion which sought rehearing on the ssues of Speech and Debate Clause Immunity and whether a non-sticiable political question existed. Oral argument at the ehearing en banc was presented by Petitioner and Respondent oncerning these issues. The Fifth Circuit majority en banc decided he issues of the case in the fifth amendment context discussed upra but made little reference to the issues for which the rehearing as convened. If this Court were to grant certiorari concerning the ifth amendment issues and were to rule against the Respondent on hose issues, Respondent, of course, will assert as a defense that a result of immunity conferred upon congressmen by the Speech nd Debate Clause and the political nature of the question, espondent still is not liable to Petitioner for her discharge.

Respondent submits that the work of Congressional aides such an integral part of the legitimate legislative function hat a Congressman's decision to hire or discharge a legislative taff member is itself a legislative act which is immune under the peech and Debate Clause from executive or judicial interference.

The importance of the legislative functions of these ides has been previously recognized by this Court in Gravel v. nited States, 408 U.S. 606, at 617:

> ". . .it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of Congress to perform their legislative tasks without the help of aides or assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 US 169, 181, 15 L Ed 2d 681, 86 S Ct 749 (1966) -- will inevitably be diminished and frustrated." (Emphasis supplied)

Respondent asserts that a Congressman should be free to choose his own "alter ego" without being questioned outside of the Halls of Congress by the judiciary. The relationship of a congressman to his staff[6] is thus so intimately involved with the immune legislative function that a congressman's personnel decisions are themselves protected by the immunity conferred under the Speech and Debate Clause of the Constitution.

Intertwined with Speech and Debate Clause immunity is the related assertion that judicial scrutiny of congressional personnel actions involve ". . .policy determinations of a kind clearly for non-judicial discretion;" Baker v. Carr, 369 U.S. 186, at 217 (1962). Such judicial intervention in the internal workings of Congress flies in the face of the doctrine of separation of powers within the federal government and itself is a basis for dismissal of the complaint in this case.

Respondent submits that its legal position as to Speech and Debate Clause immunity coupled with political question non-justiciability and the doctrine of separation of powers is sound and meritorious. Inasmuch as Respondent will ultimately prevail on these bases the petition for certiorari should be denied.

Further, since the time of the oral argument of this case before the Fifth Circuit en banc in September, 1977, a Report of the Committee on Governmental Affairs in the United States Senate

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[6] It should be noted that Petitioner and Respondent are not in agreement in this action as to the importance or nature of Petitioner Davis' job on the staff of former Congressman Passman. Respondent asserts that her duties encompassed a legislative function role while Petitioner describes her role as "an office supervisor" with no relation to the legislative or policy aspects of Respondent's office. See Petition for Certiorari at 21, 23.

has issued reporting favorably on an original resolution (S. RES. 431) to implement the provisions of Rule L of the Standing Rules of the Senate, which will become effective January 3, 1979. Rule L states:

> "No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof -
> (a) fail or refuse to hire an individual;
> (b) discharge an individual; or
> (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment
> on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

Senate Resolution 431 [Report No. 95-729] attached hereto as Appendix F is on the Senate's calendar for adoption at the time of this writing. Senate Resolution 431 provides an internal or legislative procedure for processing complaints of discrimination which arise under Rule L. It is clear that Congress is moving rapidly toward providing its own remedies without judicial assistance and that the wisdom of a policy of judicial restraint from interference in the internal personnel problems of Congress evidenced by the Fifth Circuit's decision below is a weighty consideration which warrants denial of the petition for certiorari in this case.

CONCLUSION

Respondent respectfully submits that for the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

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By: A. Richard Gear
A. Richard Gear

CERTIFICATE OF SERVICE

I certify that a copy of the Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon the counsel of record for petitioner, Ms. Sana F. Shtasel and Mr. Peter Barton Hutt, at their address, 888 Sixteenth Street, N.W., Washington, D.C. 20006, by mailing same, certified mail, return receipt requested in the United States Mail.

Monroe, Louisiana, this 10th day of October, 1978.

s/ A. Richard Gear
A. Richard Gear

APPENDIX F

95TH CONGRESS
2D SESSION

S. RES. 431

[Report No. 95–729]

IN THE SENATE OF THE UNITED STATES

APRIL 7 (legislative day, FEBRUARY 6), 1978

Mr. GLENN (for Mr. RIBICOFF), from the Committee on Governmental Affairs reported the following resolution; which was referred to the Committee on Human Resources pursuant to section 310 of Senate Resolution 110, Ninety-Fifth Congress, first session, for not to exceed 60 days

RESOLUTION

To implement rule L of the Standing Rules of the Senate, relating to employment practices.

Resolved, That this resolution may be cited as the "Lee Metcalf Fair Employment Relations Resolution".

PURPOSE

SEC. 2. It is the purpose of this resolution to implement the provisions of rule L of the Standing Rules of the Senate, which will become effective on January 3, 1979, by establishing a Senate Fair Employment Relations Board, a Senate Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations of rule L by Members, officers, and employees of the Senate.

DEFINITIONS

SEC. 3. For purposes of this resolution, the term—

(1) "Board" means the Senate Fair Employment Relations Board established by section 101;

(2) "Office" means the Senate Fair Employment Relations Office established by section 201;

(3) "Director" means the Director of the Senate Fair Employment Relations Office established by section 201;

(4) "employee of the Senate" means any individual who is an employee of the Senate, or is treated as an employee of the Senate, for purposes of the Senate Code of Official Conduct;

(5) "complainant" means an employee of the Senate or other individual who applies for a position in the Senate and who files a complaint under section 302;

(6) "respondent" means a Member, officer, or employee of the Senate against whom a complaint is filed under section 302;

(7) "office of the Senate" includes the office of a Senator;

(8) "rule L" means rule L of the Standing Rules of the Senate; and

(9) "supervisor" has the meaning given to it by paragraph 12 of rule XLV of the Standing Rules of the Senate.

TITLE I—FAIR EMPLOYMENT RELATIONS BOARD

ESTABLISHMENT

SEC. 101. (a) There is established an office of the Senate to be known as the Senate Fair Employment Relations Board. The Board shall consist of six members, selected from among individuals in the private sector, who have a demonstrated commitment to fair employment relations—

(1) three of whom shall be appointed by, and may be removed by, the Majority Leader of the Senate with the approval, by majority vote, of the Conference of the Majority; and

(2) three of whom shall be appointed by, and may be removed by, the Minority Leader of the Senate with the approval, by majority vote, of the Conference of the Minority.

No individual who has served as a Member, officer, or employee of the Senate or the House of Representatives or as an officer or employee of the Congress may be appointed as a member of the Board during the three-year period following the termination of his or her service as such a Member, officer, or employee.

(b) Each member of the Board shall be appointed for a term of four years commencing with the day after the expiration of the term of his or her predecessor, except that of the members first appointed—

(1) one member appointed by the Majority Leader and one member appointed by the Minority Leader (as designated by the respective Leaders) shall be appointed for a term of two years commencing on the day on which this resolution is agreed to; and

(2) two members appointed by the Majority Leader and two members appointed by the Minority Leader (as designated by the respective Leaders) shall be appointed for a term of four years commencing on such day.

Any member appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired portion of such term. Any member serving at the expiration of a term may continue to serve until his or her successor is appointed.

(c) The Board shall elect one of its members to serve as Chairperson.

(d) A quorum of the Board shall consist of four members, but no action of the Board in performing the functions and duties specified in paragraphs (1) and (3) of section 104 (a) or in appointing or removing the Director under section 201 may be taken except with the concurrence of a majority of the members holding office.

(e) The Board is authorized to delegate to the Chairperson or any other member of the Board the authority to

approve on behalf of the Board those actions of the Director which require approval of the Board under sections 201, 202, and 203.

COMPENSATION

SEC. 102. Each member of the Board shall receive compensation equal to the daily equivalent of the salary of the Secretary of the Senate for each day on which the member is engaged in performing his or her duties as a member of the Board and in traveling from or to his or her home to attend meetings of the Board. Each member shall also be entitled to reimbursement for transportation costs and actual travel expenses while so traveling in the same amounts as are payable to employees of the Senate.

MEETINGS; ADMINISTRATIVE SERVICES

SEC. 103. (a) The Board shall meet at least once every three months and shall also meet upon call of the Chairperson or of a majority of the members holding office. Notice of any meeting of the Board shall be given to all members at least three days prior to such meeting.

(b) All necessary administrative services required by the Board shall be furnished by the Office.

FUNCTIONS AND DUTIES

SEC. 104. (a) It shall be the function and duty of the Board—

(1) to establish and publish policies and guidelines for the implementation and enforcement of rule L;

(2) to supervise the actions of the Director and the operations of the Office through the Director; and

(3) to hear and determine complaints alleging violations of rule L in accordance with title III.

(b) In order to carry out its functions and duties under title III, the Board is authorized to appoint and fix the compensation (subject to applicable limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such number of hearing examiners as may be necessary. Any such hearing examiner may be appointed on a temporary (not to exceed one year) or intermittent basis and any hearing examiner so appointed may be paid, for each day on which he or she performs services, not in excess of the daily equivalent of the highest salary which may be paid to a hearing examiner appointed on a permanent basis.

(c) The Board may adopt such regulations as it determines necessary to carry out its duties and functions.

PAYMENT OF EXPENSES

SEC. 105. The expenses of the Board (including compensation of members of the Board and hearing examiners) shall be paid from the contingent fund of the Senate pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and ex-

penses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers approved by the Chairperson, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE II—SENATE FAIR EMPLOYMENT RELATIONS OFFICE

ESTABLISHMENT

SEC. 201. (a) There is established an office of the Senate to be known as the Senate Fair Employment Relations Office. The Office shall be headed by a Director who shall be appointed by, and shall serve at the pleasure of, the Board. The Director shall receive compensation at an annual rate fixed by the Board but not in excess of the highest rate of compensation which may be paid to an employee of a committee of the Senate under section 105(e)(3)(A) of the Legislative Branch Appropriations Act, 1968, as amended and modified (2 U.S.C. 61–1).

(b) The Director, with the approval of the Board, shall appoint and fix the compensation (subject to applicable salary limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such personnel as may be necessary to carry out the duties and functions of the Office. All personnel of the Office shall be appointed without

regard to political affiliation and solely on the basis of their fitness to perform their duties.

(c) In carrying out the functions and duties of the Office, the Director, with the approval of the Board, may procure the temporary (not to exceed one year) or intermittent services of experts or consultants or organizations thereof by contract as independent contractors, or, in the case of individual experts or consultants, by employment at rates of pay not in excess of the daily equivalent of the highest rate of compensation which may be paid to employees of the Office appointed on a permanent basis.

(d) The Director may prescribe the duties and responsibilities of the personnel of the Office, and delegate to them authority to perform any of the functions and duties imposed on the Office or on the Director, with the exception of the submission of reports under sections 302(b) and (c).

FUNCTIONS AND DUTIES

SEC. 202. (a) In addition to the functions and duties imposed on it by title III, the Office shall (1) develop procedures to implement the policies and guidelines of the Board to encourage full compliance with rule L by all Members, officers, and employees of the Senate and (2) perform such other functions as may be prescribed by the Board.

(b) The Office shall gather and maintain information with respect to each category of employees and individuals

who are afforded equal employment opportunity by rule L, including, to the extent possible, information relating to individuals who apply for positions on the staffs of committees and offices of the Senate. The Office shall also gather and maintain information with respect to the employment practices of committees and offices of the Senate. Each year the Director, with the approval of the Board, shall submit to the Senate a report with respect to the information gathered under this subsection. Each report after the first report shall contain a comparison and evaluation of the data contained in such report with the data contained in prior reports.

(c) Upon the request of any committee or office of the Senate, the Office shall submit to such committee or office its recommendations for improvements in the employment practices of such committee or office. The Office shall assist the placement office with the development of procedures to collect and disseminate applications submitted by individuals from categories which are afforded equal employment opportunity by rule L.

(d) The Office shall review the procedures and practices for receiving, hearing, and settling complaints of alleged violations of rule L under title III and make recommendations regarding the continuation or improvement of such procedures. Not later than January 3, 1981, the Director, with the approval of the Board, shall submit

to the Senate the results of such review, together with his or her recommendations. Such report shall be referred to the appropriate committee or committees of the Senate which, within one hundred and eighty days after the date of referral, shall submit their recommendations on the report to the Senate.

SUPPLIES; PAYMENT OF EXPENSES

SEC. 203. (a) The Director is authorized to procure such books, stationery, and other supplies as may be necessary for the proper performance of the functions and duties of the Office. The Architect of the Capitol and the Sergeant at Arms of the Senate shall furnish the Office such furniture and office equipment as may be necessary.

(b) The expenses of the Office (including salaries) shall be paid from the contingent fund of the Senate pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers signed by the Director, and approved by the Board, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE III—COMPLAINTS OF VIOLATIONS OF EQUAL EMPLOYMENT OPPORTUNITY

PART A—COUNSELING AND CONCILIATION

COUNSELING AND ASSISTANCE

SEC. 301. (a) Any employee of the Senate, or other individual who applies for a position in the Senate, who believes that he or she is being or has been discriminated against in violation of rule L may make a request to the Office for counseling and assistance. The Director shall designate employees of the Office to serve as counselors. Counselors shall advise employees and other individuals as to their rights under rule L and furnish such other advice and assistance as may be requested with respect to the application of rule L. No written statement shall be required for an employee or other individual to receive counseling and assistance under this section.

(b) Counseling under this section must be requested within sixty days of the action giving rise to the alleged discrimination, unless the Director authorizes counseling after such sixty-day period or unless the alleged discrimination is based upon a continuing practice or policy.

INFORMAL COMPLAINTS AND CONCILIATION

SEC. 302. (a) Any employee of the Senate, or other individual who applies for a position in the Senate, who

believes that he or she is being or has been discriminated against in violation of rule L may, within twenty days after counseling is requested under section 301, file an informal complaint with the Director. Such an informal complaint may be filed only against an individual whom the complainant believes actually participated in the alleged violation or the individual who has authority to remedy the alleged violation, or both. Such an informal complaint shall consist of a brief written statement of the alleged violation. The Director shall furnish a copy of such informal complaint to the respondent and, if the respondent is an officer or employee, shall furnish a copy of such informal complaint to the respondent's supervisor.

(b) Upon the filing of an informal complaint under subsection (a), the Director shall collect information concerning the alleged violation. Within forty-five days after the date of filing, the Director shall submit a report to the Board with respect to such informal complaint and shall furnish copies of such report to the complainant and respondent and, if the respondent is an officer or employee, shall furnish a copy of such report to the respondent's supervisor.

(c) (1) If as a result of the information collected under subsection (b), the Director determines that there is no reason to believe that a violation of rule L may have occurred, he or she shall so state in the report submitted pursuant to

such subsection, together with his or her reasons for such determination.

(2) If as a result of the information collected under subsection (b), the Director determines that there is reason to believe a violation of rule L may have occurred, he or she shall attempt to resolve such violation by informal means. If an informal agreement between the complainant and respondent is reached, the Director shall so state in the report submitted pursuant to such subsection. If an informal agreement between the complainant and the respondent is not reached, the Director shall include his or her findings in the report submitted pursuant to such subsection.

PART B—FORMAL COMPLAINTS AND HEARINGS

FILING OF FORMAL COMPLAINTS

SEC. 311. (a) If the report of the Director under section 302 with respect to an informal complaint sets forth the Director's determination that there is reason to believe that a violation of rule L may have occurred but no agreement has been reached between the complainant and the respondent, then the complainant may, within thirty days after the date on which such report is submitted to the Board, file a formal complaint with the Board. A formal complaint shall be under oath and shall be in such form and set forth the basis of the complaint in such detail as the Board may prescribe by rule or regulation.

(b) If the report of the Director under section 302 sets forth the Director's determination that there is no reason to believe that a violation of rule L may have occurred, the complainant may request the Board to review such determination. Such request shall be in writing and shall be made within thirty days after the date on which such report is submitted to the Board. The Board shall complete its review within thirty days after such request is made and if it determines that there is reason to believe that a violation of rule L may have occurred, the complainant may, within thirty days after the date of the Board's determination, file a formal complaint under subsection (a).

HEARINGS

SEC. 312. (a) Each complaint filed under section 311 shall be assigned by the Board (or by such individual as the Board may designate) for a hearing by a hearing examiner appointed under section 104(b). The hearing examiner shall cause a copy of the complaint to be served on the respondent and, if the respondent is an officer or employee, shall furnish a copy of the complaint to the respondent's supervisor. The respondent shall be entitled to file, within ten days after such service, or within such longer time as the Board may permit, a formal answer to such complaint. A formal answer shall be under oath and shall be in such form as the Board may prescribe by rule or regulation.

(b) The hearing on a complaint shall be conducted expeditiously with a record in transcript form. Upon conclusion of the hearing, the hearing examiner shall submit to the Board a report containing his or her findings and recommendations (if any) for remedial action.

DECISIONS BY THE BOARD

SEC. 313. (a) The Board shall review the transcript and the findings and recommendations of the hearing examiner with respect to each complaint filed under section 311. If the Board finds that the hearing is incomplete, it may remand the case to the hearing examiner. The Board shall render a decision in each case within sixty days after the filing of the formal complaint, unless prior thereto the complainant and the respondent reach an agreement disposing of such case.

(b) If the Board determines in any case that there is or has been a violation of rule L, its decision shall include an order for such remedial action as it determines appropriate, except that no remedy may be ordered which the Board determines would result in undue benefit or undue hardship to the complainant or the respondent.

RULES; PROCEDURE

SEC. 314. The Board shall prescribe such rules or regulations as it determines proper to carry out the provisions of this part, including rules or regulations relating to the conduct

of hearings and proceedings under this part and the rights and privileges of complainants and respondents in such hearings and proceedings. The Board shall publish all rules and regulations which it proposes to prescribe under this section and shall give interested persons an opportunity to comment thereon.

PART C—APPEALS TO SELECT COMMITTEE ON ETHICS

APPEALS

SEC. 321. (a) A complainant or respondent who is aggrieved by a decision or order of the Board under section 313 may, within thirty days after the decision or order is issued, appeal the decision or order to the Select Committee on Ethics.

(b) Within sixty days after an appeal is filed under subsection (a), the Select Committee on Ethics shall render its decision with respect to such appeal. Such decision may affirm the decision or order of the Board, reverse such decision or order in whole or in part, or remand the case to the Board for further proceedings. In any case in which the select committee reverses a decision or order of the Board in whole or in part, if the select committee determines that there is or has been a violation of rule L, it may order such remedial action as it determines appropriate, except that no remedy may be ordered which the select committee determines would

result in undue benefit or undue hardship to the complainant or the respondent.

PROCEDURE

SEC. 322. The Select Committee on Ethics shall prescribe such rules or regulations as it determines proper to carry out the provisions of section 321.

PART D—MISCELLANEOUS

REMEDIES

SEC. 331. (a) The remedial actions which may be specified in an order issued by the Board under section 313 or by the Select Committee on Ethics under section 321 include, but are not limited to—

(1) if the discrimination is failure or refusal to hire an individual, a requirement that such individual be employed within a specified period of time, or the payment of a specified sum to such individual, or both;

(2) if the discrimination is discharging an individual, a requirement that such individual be reemployed within a specified period of time, or the payment of a specified sum to such individual, or both;

(3) if the discrimination is with respect to the promotion or compensation of an individual, a requirement that such individual be promoted to or compensated at a specified level within a specified period of time, or the

payment of a specified sum to such individual, or both; and

(4) if the discrimination is with respect to terms, conditions, or privileges of employment of an individual, a requirement that such terms, conditions, or privileges be changed within a specified period of time, or the payment of a specified sum to such individual, or both.

(b) Any payment ordered to be made to an individual under an order issued by the Board or the Select Committee on Ethics shall be made out of the contingent fund of the Senate upon a voucher signed by the Chairperson of the Board or the chairman of the select committee, as the case may be.

(c) No complainant or witness in a proceeding under this title shall be subject to any reprisal, interference, intimidation, or coercion by any Member, officer, or employee of the Senate as a result of filing such complaint or appearing as such a witness.

RECORDS; CONFIDENTIALITY OF INFORMATION

SEC. 332. (a) The records, files, and papers relating to each informal complaint filed under section 302, each formal complaint filed under section 311, and each appeal taken under section 321 shall constitute papers of the Senate and shall be retained for at least five years. All such information, including the existence of a case, shall be main-

tained on a confidential basis, and, except as provided in subsection (b) or as otherwise ordered by the Senate, such information shall not be disclosed to any person (other than the complainant and the respondent) and shall not be available for inspection other than by the Board, the Director and employees of the Office, and, with respect to any appeal taken under section 321, the Select Committee on Ethics.

(b) Decisions and orders of the Board under section 313 and decisions and orders of the Select Committee on Ethics under section 321 shall be made public.

COOPERATION BY COMMITTEES AND OFFICES

SEC. 333. Each committee and office of the Senate shall cooperate with the Board, the Office, and the Select Committee on Ethics in order that the functions and duties imposed on them by this resolution may be properly and effectively carried out.

95TH CONGRESS
2D SESSION

S. RES. 431

[Report No. 95–729]

RESOLUTION

To implement rule L of the Standing Rules of the Senate, relating to employment practices.

By Mr. RIBICOFF

APRIL 7 (legislative day, FEBRUARY 6), 1978

Referred to the Committee on Human Resources pursuant to section 310 of Senate Resolution 110, Ninety-fifth Congress, first session, for not to exceed 60 days

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SUPREME COURT, U.S.

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ORIGINAL COPY

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

SUPPLEMENT TO RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October, 1978

A. Richard Gear
HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana

Attorney for Respondent

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

SUPPLEMENT TO RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Otto E. Passman, pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, hereby files this Supplement to Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in order to bring to the attention of the Court a new development which is relevant to its deliberations with respect to the Petition for Certiorari.

Senate Resolution 431 [Report No. 95-729] was attached to that Response as Appendix F. This resolution provides for an internal procedure for processing discrimination complaints based upon race, color, religion, sex, national origin, age, or state of physical handicap. Remedies provided therein include hiring, reemployment, payment of specified sums, and promotions. In addition to this demonstrable evidence that the Senate is attending to its own alleged employment problems without interference by the judiciary, a very recent development demonstrates that the House of Representatives is also proceeding to enact a binding procedure for processing and remedying complaints of prohibited discrimination.

On September 25, 1978, House Resolution 1380 (H. Res. 1380) attached hereto as Appendix G, was submitted to the House of Representatives. As can be seen, the resolution is called the "Fair Employment Relations Resolution" and establishes a House Fair Employment Relations Board, a House Fair Employment Relations Office, and detailed binding procedures for hearing and settling complaints of discrimination. It creates remedies of hiring, reemployment, payment of specified sums and promotions. The Fair Employment Relations Resolution implements, inter alia, clause 9 of Rule XLIII of the internal Rules of the House of Representatives[1] which was adopted on January 14, 1975[2] and states as follows:

> "9. A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Respondent presents this development for the consideration of the Court to further emphasize that the Congress is solving whatever employee relations problems may exist within its halls without the assistance or interference of the judiciary. It is respectfully submitted that Congress be permitted to continue to pursue its own solutions.

Based upon the reasons set forth in the Response in Opposition and this Supplement, Respondent urges that certiorari be denied.

Respectfully submitted,

HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71201

By: A. Richard Gear
A. Richard Gear

[1] 94th Congress Second Session, House Document No. 94-663; Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States at 674.

[2] Congressional Record, January 14, 1975, at 22. The date of adoption was approximately 6 months after the July 31, 1974, termination of Plaintiff Davis.

APPENDIX G

95TH CONGRESS
2D SESSION

H. RES. 1380

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 1978

Mrs. SCHROEDER submitted the following resolution; which was referred jointly to the Committees on House Administration and Rules

RESOLUTION

Resolved, That this resolution may be cited as the "Fair Employment Relations Resolution".

PURPOSE

SEC. 2. It is the purpose of this resolution to implement clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives, by establishing a House Fair Employment Relations Board, a House Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the

House of Representatives by Members, officers, and employees of the House.

DEFINITIONS

SEC. 3. For purposes of this resolution, the term—

(1) "Board" means the House Fair Employment Relations Board established by section 101;

(2) "Office" means the House Fair Employment Relations Office established by section 201;

(3) "Director" means the Director of the House Fair Employment Relations Office established by section 201;

(4) "employee of the House" means any individual who is an employee of the House, or is treated as an employee of the House, for purposes of the Code of Official Conduct of the House of Representatives;

(5) "complainant" means an employee of the House or other individual who applies for a position in the House and who files a complaint under section 302;

(6) "respondent" means a Member, officer, or employee of the House against whom a complaint is filed under section 302;

(7) "Member" means a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico; and

(8) "office of the House" includes the office of a Member;

(9) "clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI" refer to clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives.

TITLE I--FAIR EMPLOYMENT RELATIONS BOARD

ESTABLISHMENT

SEC. 101. (a) There is established an office of the House to be known as the House Fair Employment Relations Board. The Board shall consist of six members, selected from among individuals in the private sector, who have a demonstrated commitment to fair employment relations—

(1) three of whom shall be appointed by, and may be removed by, the Speaker of the House; and

(2) three of whom shall be appointed by, and may be removed by, the minority leader of the House.

No individual who has served as a Member, officer, or employee of the Senate or the House of Representatives or as an officer or employee of the Congress may be appointed as a member of the Board during the three-year period following the termination of his or her service as such a Member, officer, or employee.

(b) Each member of the Board shall be appointed for a term of four years commencing with the day after the expiration of the term of his or her predecessor, except that of the members first appointed—

(1) one member appointed by the Speaker and one member appointed by the minority leader (as designated at the time of appointment) shall be appointed for a term of two years commencing on the day on which this resolution is agreed to; and

(2) two members appointed by the Speaker and two members appointed by the minority leader (as designated at the time of appointment) shall be appointed for a term of four years commencing on such day.

Any member appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired portion of such term. Any member serving at the expiration of a term may continue to serve until his or her successor is appointed.

(c) The Board shall elect one of its members to serve as Chairperson.

(d) A quorum of the Board shall consist of four members, but no action of the Board in performing the functions and duties specified in paragraphs (1) and (3) of section 104(a) or in appointing or removing the Director under section 201 may be taken except with the concurrence of a majority of the members holding office.

(e) The Board is authorized to delegate to the Chairperson or any other member of the Board the authority to approve on behalf of the Board those actions of the Director which require approval of the Board under sections 201, 202, and 203.

COMPENSATION

SEC. 102. Each member of the Board shall receive compensation equal to the daily equivalent of the salary of the Clerk of the House for each day on which the member is engaged in performing his or her duties as a member of the Board and in traveling from or to his or her home to attend meetings of the Board. Each member shall also be entitled to reimbursement for transportation costs and actual travel expenses while so traveling in the same amounts as are payable to employees of the House.

MEETINGS; ADMINISTRATIVE SERVICES

SEC. 103. (a) The Board shall meet at least once every three months and shall also meet upon call of the Chairperson or of a majority of the members holding office. Notice of any meeting of the Board shall be given to all members at least three days prior to such meeting.

(b) All necessary administrative services required by the Board shall be furnished by the Office.

FUNCTIONS AND DUTIES

SEC. 104. (a) It shall be the function and duty of the Board—

(1) to establish and publish policies and guidelines for the implementation and enforcement of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI;

(2) to supervise the actions of the Director and the operations of the Office through the Director; and

(3) to hear and determine complaints alleging violations of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI in accordance with title III.

(b) In order to carry out its functions and duties under title III, the Board is authorized to appoint and fix the compensation (subject to applicable limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such number of hearing examiners as may be necessary. Any such hearing examiner may be appointed on a temporary (not to exceed one year) or intermittent basis and any hearing examiner so appointed may be paid, for each day on which he or she performs services, not in excess of the daily equivalent of the highest salary which may be paid to a hearing examiner appointed on a permanent basis.

(c) The Board may adopt such regulations as it determines necessary to carry out its duties and functions.

PAYMENT OF EXPENSES

SEC. 105. The expenses of the Board (including compensation of members of the Board and hearing examiners) shall be paid from the contingent fund of the House of Representatives pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers approved by the Chairperson, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE II—HOUSE FAIR EMPLOYMENT RELATIONS OFFICE

ESTABLISHMENT

SEC. 201. (a) There is established an office of the House to be known as the House Fair Employment Relations Office. The Office shall be headed by a Director who shall be appointed by, and shall serve at the pleasure of, the Board. The Director shall receive compensation at an annual rate fixed by the Board, but not in excess of the highest rate of basic pay, as in effect from time to time, of level V of the Executive Schedule in section 5316 of title 5, United States Code.

(b) The Director, with the approval of the Board, shall appoint and fix the compensation (subject to applicable salary limitations imposed by or pursuant to law on the salaries of employees of the House) of such personnel as may be necessary to carry out the duties and functions of the Office. All personnel of the Office shall be appointed without regard to political affiliation and solely on the basis of their fitness to perform their duties.

(c) In carrying out the functions and duties of the Office, the Director, with the approval of the Board, may procure the temporary (not to exceed one year) or intermittent services of experts or consultants or organizations thereof by contract as independent contractors, or, in the case of individual experts or consultants, by employment at rates of pay not in excess of the daily equivalent of the highest rate of compensation which may be paid to employees of the Office appointed on a permanent basis.

(d) The Director may prescribe the duties and responsibilities of the personnel of the Office, and delegate to them authority to perform any of the functions and duties imposed on the Office or on the Director, with the exception of the submission of reports under sections 302 (b) and (c).

FUNCTIONS AND DUTIES

SEC. 202. (a) In addition to the functions and duties imposed on it by title III, the Office shall (1) develop proce-

dures to implement the policies and guidelines of the Board to encourage full compliance with clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI by all Members, officers, and employees of the House and (2) perform such other functions as may be prescribed by the Board.

(b) The Office shall gather and maintain information with respect to each category of employees and individuals who are afforded equal employment opportunity by clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI, including, to the extent possible, information relating to individuals who apply for positions on the staffs of committees and offices of the House. The Office shall also gather and maintain information with respect to the employment practices of committees and offices of the House. Each year the Director, with the approval of the Board, shall submit to the House a report with respect to the information gathered under this subsection. Each report after the first report shall contain a comparison and evaluation of the data contained in such report with the data contained in prior reports.

(c) Upon the request of any committee or office of the House, the Office shall submit to such committee or office its recommendations for improvements in the employment practices of such committee or office. The Office shall assist the placement office with the development of procedures to collect and disseminate applications submitted by individuals

from categories which are afforded equal employment opportunity by clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI.

(d) The Office shall review the procedures and practices for receiving, hearing, and settling complaints of alleged violations of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI under title III and make recommendations regarding the continuation or improvement of such procedures. Not later than January 3, 1981, the Director, with the approval of the Board, shall submit to the House the results of such review, together with his or her recommendations. Such report shall be referred to the appropriate committee or committees of the House which, within one hundred and eighty days after the date of referral, shall submit their recommendations on the report to the House.

SUPPLIES; PAYMENT OF EXPENSES

SEC. 203. (a) The Director is authorized to procure such books, stationery, and other supplies as may be necessary for the proper performance of the functions and duties of the Office. The Architect of the Capitol and the Sergeant at Arms of the House of Representatives shall furnish the Office such furniture and office equipment as may be necessary.

(b) The expenses of the Office (including salaries) shall be paid from the contingent fund of the House of Representatives pursuant to appropriations made to the contingent fund

for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers signed by the Director, and approved by the Board, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE III—COMPLAINTS OF VIOLATIONS OF EQUAL EMPLOYMENT OPPORTUNITY

PART A—COUNSELING AND CONCILIATION

COUNSELING AND ASSISTANCE

SEC. 301. (a) Any employee of the House, or other individual who applies for a position in the House, who believes that he or she is being or has been discriminated against in violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may make a request to the Office for counseling and assistance. The Director shall designate employees of the Office to serve as counselors. Counselors shall advise employees and other individuals as to their rights under clause 9 of rule XLIII or clause 6(a)(3)(A) and furnish such other advice and assistance as may be requested with respect to the application of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI. No written statement shall be required for an employee or other individual to receive counseling and assistance under this section.

(b) Counseling under this section must be requested within sixty days of the action giving rise to the alleged discrimination, unless the Director authorizes counseling after such sixty-day period or unless the alleged discrimination is based upon a continuing practice or policy.

INFORMAL COMPLAINTS AND CONCILIATION

SEC. 302. (a) Any employee of the House, or other individual who applies for a position in the House, who believes that he or she is being or has been discriminated against in violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may, within twenty days after counseling is requested under section 301, file an informal complaint with the Director. Such an informal complaint may be filed only against an individual whom the complainant believes actually participated in the alleged violation or the individual who has authority to remedy the alleged violation, or both. Such an informal complaint shall consist of a brief written statement of the alleged violation. The Director shall furnish a copy of such informal complaint to the respondent and, if the respondent is an officer or employee, shall furnish a copy of such informal complaint to the respondent's employer.

(b) Upon the filing of an informal complaint under subsection (a), the Director shall collect information concerning the alleged violation. Within forty-five days after the date of filing, the Director shall submit a report to the Board with

respect to such informal complaint and shall furnish copies of such report to the complainant and respondent and, if the respondent is an officer or employee, shall furnish a copy of such report to the respondent's employer.

(c)(1) If as a result of the information collected under subsection (b), the Director determines that there is no reason to believe that a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, he or she shall so state in the report submitted pursuant to such subsection, together with his or her reasons for such determination.

(2) If as a result of the information collected under subsection (b), the Director determines that there is reason to believe a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, he or she shall attempt to resolve such violation by informal means. If an informal agreement between the complainant and respondent is reached, the Director shall so state in the report submitted pursuant to such subsection. If an informal agreement between the complainant and the respondent is not reached, the Director shall include his or her findings in the report submitted pursuant to such subsection.

PART B—FORMAL COMPLAINTS AND HEARINGS

FILING OF FORMAL COMPLAINTS

SEC. 311. (a) If the report of the Director under section 302 with respect to an informal complaint sets forth the Director's determination that there is reason to believe that a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred but no agreement has been reached between the complainant and the respondent, then the complainant may, within thirty days after the date on which such report is submitted to the Board, file a formal complaint with the Board. A formal complaint shall be under oath and shall be in such form and set forth the basis of the complaint in such detail as the Board may prescribe by rule or regulation.

(b) If the report of the Director under section 302 sets forth the Director's determination that there is no reason to believe that a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, the complainant may request the Board to review such determination. Such request shall be in writing and shall be made within thirty days after the date on which such report is submitted to the Board. The Board shall complete its review within thirty days after such request is made and if it determines that there is reason to believe that a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, the complainant may, within thirty days after the date of the

Board's determination, file a formal complaint under subsection (a).

HEARINGS

SEC. 312. (a) Each complaint filed under section 311 shall be assigned by the Board (or by such individual as the Board may designate) for a hearing by a hearing examiner appointed under section 104(b). The hearing examiner shall cause a copy of the complaint to be served on the respondent and, if the respondent is an officer or employee, shall furnish a copy of the complaint to the respondent's employer. The respondent shall be entitled to file, within ten days after such service, or within such longer time as the Board may permit, a formal answer to such complaint. A formal answer shall be under oath and shall be in such form as the Board may prescribe by rule or regulation.

(b) The hearing on a complaint shall be conducted expeditiously with a record in transcript form. Upon conclusion of the hearing, the hearing examiner shall submit to the Board a report containing his or her findings and recommendations (if any) for remedial action.

DECISIONS BY THE BOARD

SEC. 313. (a) The Board shall review the transcript and the findings and recommendations of the hearing examiner with respect to each complaint filed under section 311. If the Board finds that the hearing is incomplete, it may remand the

case to the hearing examiner. The Board shall render a decision in each case within sixty days after the filing of the formal complaint, unless prior thereto the complainant and the respondent reach an agreement disposing of such case.

(b) If the Board determines in any case that there is or has been a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI, its decision shall include an order for such remedial action as it determines appropriate, except that no remedy may be ordered which the Board determines would result in undue benefit or undue hardship to the complainant or the respondent.

RULES; PROCEDURE

SEC. 314. The Board shall prescribe such rules or regulations as it determines proper to carry out the provisions of this part, including rules or regulations relating to the conduct of hearings and proceedings under this part and the rights and privileges of complainants and respondents in such hearings and proceedings. The Board shall publish all rules and regulations which it proposed to prescribe under this section and shall give interested persons an opportunity to comment thereon.

PART C—APPEALS TO COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

APPEALS

SEC. 321. (a) A complainant or respondent who is aggrieved by a decision or order of the Board under section 313 may, within thirty days after the decision or order is issued, appeal the decision or order to the Committee on Standards of Official Conduct.

(b) Within sixty days after an appeal is filed under subsection (a), the Committee on Standards of Official Conduct shall render its decision with respect to such appeal. Such decision may affirm the decision or order of the Board, reverse such decision or order in whole or in part, or remand the case to the Board for further proceedings. In any case in which the committee reverses a decision or order of the Board in whole or in part, if the committee determines that there is or has been a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI, it may order such remedial action as it determines appropriate, except that no remedy may be ordered which the committee determines would result in undue benefit or undue hardship to the complainant or the respondent.

PROCEDURE

SEC. 322. The Committee on Standards of Official Conduct shall prescribe such rules or regulations as it determines proper to carry out the provisions of section 321.

PART D—MISCELLANEOUS

REMEDIES

SEC. 331. (a) The remedial actions which may be specified in an order issued by the Board under section 313 or by the Committee on Standards of Official Conduct under section 321 include, but are not limited to—

(1) if the discrimination is failure or refusal to hire an individual, a requirement that such individual be employed within a specified period of time, or the payment of a specified sum to such individual, or both;

(2) if the discrimination is discharging an individual, a requirement that such individual be reemployed within a specified period of time, or the payment of a specified sum to such individual, or both;

(3) if the discrimination is with respect to the promotion or compensation of an individual, a requirement that such individual be promoted to or compensated at a specified level within a specified period of time, or the payment of a specified sum to such individual, or both; and

(4) if the discrimination is with respect to terms, conditions, or privileges of employment of an individual, a requirement that such terms, conditions, or privileges be changed within a specified period of time, or the payment of a specified sum to such individual, or both.

(b) Any payment ordered to be made to an individual under an order issued by the Board or the Committee on Standards of Official Conduct shall be made out of the contingent fund of the House upon a voucher signed by the Chairperson of the Board or the chairman of the committee, as the case may be.

(c) No complainant or witness in a proceeding under this title shall be subject to any reprisal, interference, intimidation, or coercion by any Member, officer, or employee of the House as a result of filing such complaint or appearing as such a witness.

RECORDS; CONFIDENTIALITY OF INFORMATION

SEC. 332. (a) The records, files, and papers relating to each informal complaint filed under section 302, each formal complaint filed under section 311, and each appeal taken under section 321 shall constitute papers of the House and shall be retained for at least five years. All such information, including the existence of a case, shall be maintained on a confidential basis, and, except as provided in subsection (b) or

as otherwise ordered by the House, such information shall not be disclosed to any person (other than the complainant and the respondent) and shall not be available for inspection other than by the Board, the Director and employees of the Office, and, with respect to any appeal taken under section 321, the Committee on Standards of Official Conduct.

(b) Decisions and orders of the Board under section 313 and decisions and orders of the Committee on Standards of Official Conduct under section 321 shall be made public.

COOPERATION BY COMMITTEES AND OFFICES

SEC. 333. Each committee and office of the House shall cooperate with the Board, the Office, and the Committee on Standards of Official Conduct in order that the functions and duties imposed on them by this resolution may be properly and effectively carried out.

95TH CONGRESS
2D SESSION

H. RES. 1380

RESOLUTION

To implement clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives, relating to employment practices.

By Mrs. SCHROEDER

SEPTEMBER 25, 1978

Referred jointly to the Committees on House Administration and Rules

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No. 78-5072

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SHIRLEY DAVIS, Petitioner,

v.

OTTO E. PASSMAN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER

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REPLY OF PETITIONER

Petitioner Shirley Davis files this reply in response to the opposition to certiorari filed by respondent Passman, and prays that the petition be granted.

Respondent has provided no persuasive reasons for denying certiorari. Analysis of both his arguments and of subsequent legislative events underscores the importance of this case and the presence of serious constitutional questions which have not been, but which should be, resolved by this Court.

I. Even Had Senate Resolution 431 Been Enacted Prior to the Senate Recess, It Would Have Provided No Remedy to Petitioner.

Respondent reprints Senate Resolution 431 -- which failed to pass prior to the congressional recess on October

15, 1978*/ -- and implies that this may show that Congress at long last is moving to stop unconstitutional employment practices by its members.**/ The short answer is that the Resolution did not pass and in fact provoked major dispute on the Senate floor. Moreover, even had this Resolution been enacted, it would have provided no remedy to petitioner. Most fundamentally, the Senate Resolution would not have addressed employment discrimination in the House of Representatives. 124 Cong. Rec. S18236 (daily ed. October 11, 1978). Additionally, by its own terms, the Resolution would have covered only some claims of discrimination by former employees of the Senate and would have covered no claims where the offending member had left office. S. Res. No. 431 § 3(4),(5),(6). Significantly, the Resolution would have conferred no cause of action in the courts upon employees suffering employment discrimination. S. Rep. No. 95-729, 95th Cong., 2d Sess. 8 (1978); 124 Cong. Rec. S18228 (daily ed. October 11, 1978). Consequently, all employees of the House of Representatives, former employees of Senators, employees of former Senators, and complainants dissatisfied with internal Senate administrative procedures, would still be left without any means to redress discrimination if the act of discrimination did

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*/ Senate Resolution 431 was introduced as an amendment to the Full Employment and Balanced Growth Act of 1978, H.R. 50, on October 11, 1978. Following debate lasting more than three hours, no action was taken on the measure. 124 Cong. Rec. S18206-211; S18226-229; S18235-249; S18250-251; S18278-280 (daily ed. October 11, 1978). The amendment was ultimately withdrawn to permit passage of the parent legislation.

**/Without its passage, in the continued absence of procedures for the resolution of discrimination complaints, "there is no effective deterrent to employment discrimination." S. Rep. No. 95-729, 95th Cong., 2d Sess. 5 (1978).

not rise to constitutional proportions.*/ Finally, in no circumstances could an employee have requested monetary damages; both the proposed Fair Employment Relations Board and the Select Committee on Ethics could have ordered only "remedial action." S. Res. 431, §§ 313(b), 321(b).**/

Even had the Senate Resolution passed, there is no assurance that it would have been enforced. Like the congressional policy clearly articulated in 1955, 5 U.S.C. § 7151 (Pet. at 15 & n. 17), it could have gone unheeded and ignored in the absence of judicial relief.

Petitioner submits that the failure of Congress to enforce existing law, the failure of the Senate even to pass the Resolution which would have provided only administrative relief to some congressional employees, and the failure of the Resolution to provide any relief to litigants in petitioner's situation, underscore the need for this Court to determine that money damages are available to a congressional employee who has suffered unconstitutional discrimination and who has no other available remedy.

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*/ The Senate Committee on Governmental Affairs, relying on the decision of the panel below, clearly believed that a judicial remedy existed for invasion of constitutional rights.

> "[S]ince no statute has granted jurisdiction to the courts for enforcement of equal opportunity in Congress, judicial remedies are available only to the extent that Constitutional rights have been violated. (Under Passman v. Davis [sic], 554 F.2d 865 (5th Cir. 1977), plaintiff may assert a discrimination claim under the equal protection provision of the Due Process Clause.)" S. Rep. No. 95-729, 95th Cong., 2d Sess. 8 (1978).

See also 124 Cong. Rec. S18209, S18228 (daily ed. October 11, 1978).

**/ To be sure, one of the permissible "remedial actions" would have been a payment out of the contingent fund of the Senate. S. Res. 431, § 331. The granting of such relief would not necessarily have been equivalent to the recovery of money damages.

II. Respondent's Strained and Artificial Reading of Applicable Law and of the Decision Below Emphasizes the Importance of this Case and the Need for Certiorari.

A. Respondent contends that, because Title VII of the Civil Rights Act of 1964 does not apply to petitioner, this Court should interpret that statute as a determination by Congress to deny all rights and remedies to its employees and for that reason should decline to recognize petitioner's constitutional rights.*/ Respondent's brief fails to recognize, however, that Congress has already explicitly stated its policy to "insure equal employment opportunities for employees without discrimination because of . . . sex. . . " 5 U.S.C. § 7151 (Pet. at 15 & n. 17). This statute, which was enacted after the Civil Rights Act of 1964, covers all congressional employees, including those (like petitioner) in non-competitive positions. Respondent does not cite any authority for the novel suggestion that Congress could, if it wished, enact legislation summarily abrogating basic constitutional rights of congressional employees. The very thrust of Bivens was to provide remedies where no alternatives existed. Petitioner submits that the Civil Rights Act of 1964 provides no ground for denying certiorari.

B. Petitioner has shown that the decision of the court below cannot be reconciled with the recent decision in Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc) or numerous other cases cited in the petition. Subsequent to the filing of the petition, the United States Court of

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*/ Petitioner is not "specifically exempted" from Title VII coverage. The silence of Title VII on this subject may not be interpreted as an expression of an intent of Congress to deny its employees the right to judicial remedy of constitutional violations. See Pet. at 13-15.

Appeals for the Fourth Circuit determined that a cause of action for money damages "may be maintained directly under the Fifth Amendment," relying on the teachings of Bivens itself and the "preponderance of authority" in the lower federal courts for applying Bivens to violations of constitutional amendments other than the fourth. Loe v. Armistead, Nos. 77-2039, 77-2134, 77-2135 (4th Cir. August 16, 1978) (Slip Op. 11-13 & n. 2). The court expressly declined to follow the en banc opinion below.

Respondent's attempt artificially to narrow the broad holding of the court below is unavailing. If the decision below is allowed to stand, there will remain a clear conflict among the circuits in interpreting Bivens. Certiorari is particularly appropriate in cases, like this one, where an important constitutional issue has been decided in diametrically opposite ways in the circuits.

For the reasons stated above and set out in the petition, certiorari should be granted.

Respectfully submitted,

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October 1978

No. 78-5072

IN THE
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OCTOBER TERM, 1978

SHIRLEY DAVIS, Petitioner,

v.

OTTO E. PASSMAN, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 1978, one copy of the Reply of Petitioner was served by first-class mail, postage prepaid, upon A. Richard Gear, Esq., Hudson, Potts & Bernstein, Post Office Drawer 3008, Monroe, Louisiana 71201, Attorney for Respondent.

I further certify that all parties required to be served have been so served.

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OCT 27 PAGE 16

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SUPPLEMENTAL REPLY OF PETITIONER

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SUPPLEMENTAL REPLY OF PETITIONER

Petitioner Shirley Davis files this supplemental reply in response to the supplement to opposition to certiorari filed by respondent,[1/] and prays that the petition be granted.

In his supplemental response, respondent reprints House Resolution 1380 -- identical to Senate Resolution 431 addressed in his initial filing -- and suggests that this is further evidence that Congress is "solving whatever employee relation problems [which] may exist within its halls." (Supp. Response at 2.) As has been thoroughly discussed in petitioner's reply,

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1/ Despite reference to Supreme Court Rule 24(5), respondent's Supplement to Response in Opposition to a Petition for a Writ of Certiorari is not timely filed. Rule 24(5) provides for filing of supplemental briefs "calling attention to new cases or legislation or other intervening matter not available at the time of [the party's] last filing." (Emphasis supplied.) H. Res. 1380 was introduced September 25, 1978, and referred jointly to the Committees on House Administration and Rules. 124 Cong. Rec. H10697 (daily ed. September 25, 1978). Respondent's Response in Opposition to Petition for a Writ of Certiorari was filed with this Court October 10, 1978.

even had Senate Resolution 431 been enacted, it would have provided no remedy to petitioner. The same is equally true of the analogous House Resolution, which not only failed to pass prior to the recess, but was never reported out of committee nor debated on the House floor.[2/]

As would have been the case with Senate Resolution 431, the House Resolution by its own terms would have covered only some claims of discrimination by former employees of the House and would have covered no claims where the offending member had left office. H. Res. No. 1380 §§ 3(4), (5), (6). There is no provision that would have provided petitioner with retroactive administrative relief, nor is there any provision that would have conferred a cause of action in the courts upon employees suffering employment discrimination. Nor could an employee have requested monetary damages; both the proposed House Fair Employment Relations Board and the Committee on Standards of Official Conduct could have ordered only "remedial action." H. Res. 1380, §§ 313(b), 321(b). As indicated in petitioner's reply with respect to S. Res. 431, even had H. Res. 1380 passed, former employees of members of the House of Representatives, employees of former members, and complainants dissatisfied with internal House procedures would still have been left without any means to redress discrimination without a judicial remedy.

2/ One year ago, the Obey Commission on Administrative Review culminated a year-long study of House of Representatives' administrative organization and legislative management services with House Resolution 766. Commission on Administrative Review, U.S. H. Rep., 95th Cong., 1st Sess., Recommendations and Rationales Concerning Administrative Units and Work Management (including House Resolution 766) (Comm. Print 1977). The Resolution would have provided, inter alia, an administrative mechanism for review of employment discrimination complaints. H. Res. 766 § 101(6)(b)(8), (9), (10), (11); 504. The Rule governing consideration of these proposals, H. Res. 819, was soundly defeated on the House floor, effectively killing the proposals themselves. 123 Cong. Rec. H10819-28 (daily ed. October 12, 1977).

Petitioner submits that a House Resolution that died in committee, and that would in no case have provided relief to litigants in petitioner's situation, cannot buttress respondent's opposition. Rather, the failure of the House on several occasions to provide even limited relief to certain of its employees emphasizes the need for this Court to determine that money damages are available to a congressional employee who has suffered unconstitutional discrimination and who has no other available remedy.

For the reasons stated above and set out in the petition and reply, certiorari should be granted.

Respectfully submitted,

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October 1978

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 1978, one copy of the Supplemental Reply of Petitioner was served by first-class mail, postage prepaid, upon A. Richard Gear, Esq., Hudson, Potts & Bernstein, Post Office Drawer 3008, Monroe, Louisiana 71201, Attorney for Respondent.

I further certify that all parties required to be served have been so served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the en banc court of appeals, reported at 571 F.2d 793, appears at A. 44-95.[1] The opinion of the panel of the court of appeals, reported at 544 F.2d 865, appears at A. 11-40. The opinion of the United States District Court for the Western District of Louisiana, which is not reported, appears at A. 9-10.

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[1]Citations to A._____ are to the Appendix filed in this Court; citations to R._____ are to the Record certified to this Court by the court below.

JURISDICTION

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed a judgment of the district court on January 3, 1977. Timely petitions for rehearing and rehearing en banc were granted by order dated May 17, 1977, which appears at A. 43. The judgment of the court of appeals on rehearing en banc was entered April 18, 1978, and appears at A. 96-97. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a cause of action for money damages may be implied directly from the Fifth Amendment to the United States Constitution under the rationale of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the Speech or Debate Clause of the United States Constitution bars an action for money damages against a federal congressman who fired his office supervisor solely and expressly on the basis of her sex.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Article 1, §6 of the Constitution of the United States provides in pertinent part:

> ". . . for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Section 7151 of Title 5 of the United States Code provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin."

Section 3331 of Title 5 of the United States Code provides:

> "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . .'"

Section 1331(a) of Title 28 of the United States Code provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ."

STATEMENT OF THE CASE

This is a case of indisputable sex discrimination in employment. Plaintiff Shirley Davis was employed by

defendant Otto E. Passman, United States Congressman from the Fifth Congressional District of Louisiana, as his Deputy Administrative Assistant from February 1, 1974 through July 31, 1974. In this capacity, plaintiff was engaged in general secretarial and other clerical work. As defendant himself acknowledged, plaintiff has "experience and talent" and is an "extremely capable secretary." (A. 6.) Nonetheless, defendant terminated plaintiff's employment, stating in his June 21, 1974 letter of dismissal:

> "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." *Id.*

Plaintiff has no federal or state remedy, under statute or common law, to redress her injuries. She therefore filed this action in the United States District Court for the Western District of Louisiana on August 7, 1974, alleging that defendant's conduct constituted sex discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff requested money damages, including back pay, as well as various forms of specific relief that are now moot because defendant is no longer in office.[2]

Defendant moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending (1) his alleged conduct — discharging plaintiff

[2]Defendant was defeated in the 1976 primary election, and his tenure in office ended January 3, 1977.

because of her sex — did not violate the Fifth Amendment; (2) plaintiff has no private right of action; and (3) the suit is barred by the doctrines of sovereign and official immunity. On February 26, 1975, the district court granted the motion, ruling in defendant's favor on the first two issues, but also holding that the immunity doctrines would not bar plaintiff's suit. (A. 9-10.)

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, reversed and remanded. 544 F.2d 865 (A. 11-40). The majority held (1) dismissal of staff by a member of Congress on the basis of sex violates the equal protection component of the Fifth Amendment Due Process Clause (A. 13-19); (2) plaintiff has a private right of action for damages arising directly under the Fifth Amendment (A. 21-29); (3) sovereign immunity is no bar to a damage award against a congressman as an individual (A. 29-31); (4) legislative immunity, granted by the Speech or Debate Clause of the United States Constitution, art. I, §6, does not extend to staff dismissals since that conduct is not within the "sphere of legitimate legislative activity" (A. 31-38); and (5) a congressman enjoys no absolute immunity outside that afforded by the Speech or Debate Clause (A. 38-40). The dissenting judge concluded that the doctrine of separation of powers required affirmance of the district court's action (A. 40).

Following rehearing en banc,[3] the court of appeals reversed the opinion and judgment of the panel in a 12-2

[3]In his petition for rehearing and rehearing en banc, defendant directed the court's inquiry only to the questions whether legislative immunity barred this action and whether a congressman's firing his secretary is a political question rendering the controversy nonjusticiable. (A. 41-42.)

decision, and affirmed in part and vacated in part the judgment of the district court. 571 F.2d 793 (A. 96-97). Addressing only the question whether plaintiff has an implied cause of action for money damages arising directly under the Fifth Amendment Due Process Clause, the majority held that this Court's holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was bottomed on federal common law and the cause of action there created was "not wholly of constitutional dimensions." (A. 47-48.)[4] The court then looked to the rules of "statutory implication" articulated in *Cort v. Ash*, 422 U.S. 66, 77-85 (1975)[5] to determine whether to imply a damage action of nonconstitutional dimension (A. 49-55), and, finding the *Cort* criteria unmet, held that there was no remedy in damages to vindicate the rights asserted. (A. 55-57.)

Specially concurring, Judge Jones expressed the view that the doctrine of separation of powers, operating through the Speech or Debate Clause of the Constitution, provided absolute immunity to defendant. (A. 57-59.) In a separate special concurrence, Judge Roney stated that in his view the *Bivens* rationale was premised on the nature of the personal right asserted, and that a constitutional cause of action for

[4]Bivens had claimed that his Fourth Amendment right to be secure against unreasonable search and seizure had been violated by agents of the Federal Bureau of Narcotics acting under color of federal authority, and that this unconstitutional conduct gave rise to a federal cause of action for money damages. This Court held, *inter alia*, that a private action for money damages arises directly under the Fourth Amendment. 403 U.S. at 389. *See* pp. 13-26, *infra*.

[5]In *Cort*, this Court addressed the question whether a cause of action for money damages could be implied under a federal statute, setting forth four criteria as a basis for making such determinations. *See* pp. 26-27, *infra*.

money damages should be implied only where the damage remedy is rooted in pre-constitutional notions of tort law. (A. 59-66.)

In dissent, Judge Goldberg, joined by Chief Judge Brown, concluded that *Bivens* was a decision of constitutional magnitude that mandated the implication of a cause of action here. (A. 69-82.) In his view, that decision held that the Constitution compels *some* remedy for a person whose constitutional rights have been violated. While Congress may by statute substitute remedies for a constitutionally-based cause of action, it may not eliminate all means of vindicating a federal constitutional right. (A. 94-95.) Judge Goldberg also concluded that a proper application of the four criteria in *Cort v. Ash* would justify implication of a cause of action for money damages on the facts of this case. (A. 73-74, 82-93.)

SUMMARY OF ARGUMENT

Defendant, while serving as a United States Congressman, dismissed plaintiff from her secretarial position solely and expressly on the basis of her sex. This conduct violated the equal protection component of the Fifth Amendment Due Process Clause. Plaintiff has requested money damages to redress this violation, invoking federal court relief through the implied cause of action recognized by this Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The en banc United States Court of Appeals for the Fifth Circuit held that plaintiff has no implied cause of action

under the Fifth Amendment.[6] In making this determination, the court (1) employed a standard never articulated by this Court in deciding that this action was not "constitutionally compelled" under this Court's decision in *Bivens*; (2) ignored the federal statute, 5 U.S.C. §7151, explicitly declaring sex discrimination by a congressman to be in violation of the policy of the United States; (3) inferred that Congress adversely decided this constitutional issue by not creating a statutory cause of action for this offense; and (4) incorrectly decided that docket considerations should control whether the Bill of Rights is enforceable in federal court.

The decision below would permit a United States Congressman deliberately to violate any employee's right to equal protection under the Due Process Clause of the Fifth Amendment. It would render congressional employees helpless to seek vindication of constitutionally guaranteed rights and thus leave them wholly vulnerable to discrimination based on race, sex, religion, or national origin. It would mean that members of Congress would be virtually the only employers in this country immune from the constitutional prohibition against such forms of discrimination.

The reasoning of *Bivens* controls this case. *Bivens* held that a violation of the Constitution gives rise to the presumption of a federal damage remedy, even where other remedies might exist. Because plaintiff here has no other

[6]This issue, on which the case was decided below, was not briefed before the panel, was conceded by defendant at oral argument before the panel, and was neither raised by defendant on rehearing nor briefed by him in that proceeding. (A. 41-42.) At oral argument before the panel, defendant's attorney conceded that *Bivens* controls this case:

> "Your honor, I acknowledge to the Court that if this Court should find that there is a federally constituted right then Bivens v. the seven narcotics folks does imply a right of action." (A. 29 n.18.)

remedy, *a fortiori*, a cause of action must be implied. Nine United States courts of appeals have applied *Bivens* to claims arising under constitutional provisions other than the Fourth Amendment, including the Fifth and Fourteenth Amendment Due Process Clauses. Nothing in the rationale of *Bivens* would limit its applicability to the Fourth Amendment or exempt members of Congress from its holding.

Congressional policy is affirmatively articulated in 5 U.S.C. §7151 and in the internal rules that expressly provide that members of Congress shall not discriminate against their employees on the basis of sex. Congressional mandate thus conforms with that of the Constitution. The court below erroneously ignored these specific congressional declarations, as well as the intent of the Framers in drafting the Bill of Rights. The only reason why this Court might decline to imply a *Bivens* cause of action would be the existence of a statutory scheme that provided an alternative, but equally effective, remedy. None exists.

Instead of following the "constitutional implication" doctrine established in *Bivens*, the court below relied on the four criteria articulated by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), for determining implication of causes of action from federal statutes. Although this is the wrong standard to apply to a constitutional claim, plaintiff in fact satisfies each *Cort* criterion and is entitled to an implied cause of action even under that more stringent test.

Since plaintiff has a private cause of action against defendant, the only remaining question is whether defendant has immunity from this suit by virtue of the protection accorded members of Congress under the Constitution.

The Speech or Debate Clause of the Constitution provides defendant with the only possible bar to trial on the merits. It protects members of Congress from suit for activities "within the legislative sphere." The history and plain meaning of the Clause, as well as applicable decisions by this Court, demonstrate that discharge of a secretary, who had no policy or legislative responsibility, does not fall within its ambit. Because the Clause was intended to guarantee the separation of powers essential to our tripartite system of government, there can be no reason for the judiciary to refrain from deciding this matter if that provision is inapplicable. Blatant discrimination, based on an impermissible criterion such as race or sex and contravening both the Constitution and national policy, warrants no such protection.

This suit should be remanded to the district court for trial.

ARGUMENT

I.

A CAUSE OF ACTION FOR MONEY DAMAGES IS PROPERLY IMPLIED DIRECTLY UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION.

A. It Must Be Taken As True That Defendant Fired Plaintiff Solely And Expressly On The Basis Of Her Sex.

This case arises on defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In

deciding whether plaintiff has stated a claim upon which relief can be granted, all allegations of the complaint must be taken as true. *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976); *Radovich v. National Football League*, 352 U.S. 445, 448 (1957).

The controlling facts of this case are simple. Defendant fired plaintiff, who, in his own words, was an "extremely capable secretary,"[7] solely and expressly because he wanted a man rather than a woman to have that job. (A. 6-7.)

B. Employment Discrimination Based Solely On Sex By A Member Of Congress Violates The Equal Protection Component Of The Fifth Amendment Due Process Clause.

The Due Process Clause of the Fifth Amendment imposes an obligation on the federal government and its officials to afford equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954). This Court has established that, in order to support a valid equal protection claim, the complaint must allege intentional or purposeful discrimination based upon a scheme of classification. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Sex is, of course, one of the classifications granted equal protection scrutiny under the Fifth and Fourteenth Amendments. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190

[7]Should there be any question regarding plaintiff's tasks, she is prepared to prove at trial that her duties were solely secretarial and clerical in nature and were totally unrelated to defendant's legislative or policy-making activities.

(1976), *reh. denied*, 429 U.S. 1124 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, *reh. denied*, 420 U.S. 966 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

In the instant case, plaintiff has clearly alleged intentional discrimination based on the classification of sex. Defendant's letter terminating her employment solely because he wanted a man for the job can be interpreted no other way. (A. 6-7.)

The precise standard for determining whether conduct violates the equal protection clause remains unsettled. *Craig v. Boren, supra*, 429 U.S. at 210-11 & n.* (Powell, J., concurring). In *Reed*, this Court suggested a "minimum rationality" test, and in *Frontiero* it articulated a "suspect classification" test requiring stricter scrutiny. In *Craig* and *Goldfarb*, the Court seemingly resolved this matter in favor of "middle-level" equal protection scrutiny: "classification by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives." *Craig v. Boren, supra*, 429 U.S. at 197 (emphasis added). It makes no difference which test is applied in the instant case. Not only has defendant thus far failed to allege any governmental interest at all, but also no governmental interest sufficient to justify distinguishing between male and female clerical personnel could be advanced to satisfy even the least stringent standard.

C. *Bivens* Compels Implication Of A Cause Of Action For Money Damages On The Facts Of This Case.

This case is controlled by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), in which this Court decided that a cause of action for money damages is properly implied under the Fourth Amendment to the United States Constitution. Bivens sued agents of the Federal Bureau of Narcotics for money damages in federal court following an arrest and search not supported by either warrant or probable cause. Rejecting the argument of the government that Bivens had to be relegated to a tort action in state court, this Court held (1) a private action for money damages arises directly under the Fourth Amendment, 403 U.S. at 389; (2) the federal claim based upon unconstitutional conduct by a federal agent is independent of a state tort claim which might be raised, *id.* 394-95; and (3) money damages are a "remedial mechanism normally available in the federal courts," *id.* at 397.

Without a private cause of action, the Court concluded the Bill of Rights would be rendered meaningless and the petitioner left without remedy for invasion of constitutionally protected interests. Indeed, since the decision of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), this Court has recognized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[8] The Court then implied a

[8] *See also* Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572, 586 (1976).

damage remedy upon the authority of *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Neither the language nor the rationale of *Bivens* limits its application to Fourth Amendment violations or excludes federal legislators.

1. The Opinion Below Is Inconsistent With *Bivens*.

a. *Bivens* held that a violation of the Constitution gives rise to the presumption of a private cause of action.

The court below held the cause of action created in *Bivens* to be "not wholly of constitutional dimensions" (A. 47-48) and therefore the *Bivens* remedy "to be one implied as a matter of federal common law . . . ." (A. 49.) This conclusion, virtually barren of analysis, seems to be predicated on the fact that this Court in *Bivens* noted the absence of any congressionally-created remedy for the violation alleged in deciding that a cause of action arose directly under the Fourth Amendment. The court below then looked to the jurisprudence of statutory implication to determine whether to imply a damage action of nonconstitutional dimensions. (A. 49.)

The *Bivens* majority expressly rejected the approach adopted by the court below. In implying a cause of action

directly under the Fourth Amendment, this Court refused to accept the contention that the Fourth Amendment was limited to a defense to be asserted in a state tort suit because it would have "unduly restrict[ed] the Fourth Amendment" and the protections afforded thereunder.[9] *Bivens, supra*, 403 U.S. at 391. The Court made clear that, regardless of a state claim which might be asserted, and regardless of the adequacy of that remedy to the case at bar, the federal claim was independent of any state law claim, and "sufficient to make out the [petitioner's] cause of action." *Id.* at 395.

Although the Court implied that its *choice* of federal remedy might be affected by "affirmative action by Congress," *id.* at 396, it did not suggest that Congress could either deny the presumed availability of a cause of action or declare that no remedy may be provided for a constitutional violation. Congress could, by statute, only dictate *which* remedy, among equally effective alternatives, a court should employ.

This conclusion is underscored by the concurring opinion of Justice Harlan. Justice Harlan provided an analytical framework for the *Bivens* decision and its subsequent application and made irrefutable the conclusion that a cause of action must be implied under the Fifth Amendment as well as the Fourth.

Justice Harlan determined that it was the nature of the legal interest, rather than the nature of the remedy, which determined whether courts could award damages for violation of "constitutionally protected interests." *Bivens,*

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[9]It must be emphasized that respondents in *Bivens* never argued, as does defendant in the instant case, that *Bivens* should be left entirely without remedy for unconstitutional invasion of his rights by the federal agents. Rather, they asserted that he should be relegated to a claim for money damages in the state courts.

supra, 403 U.S. at 399. Justice Harlan did not distinguish among various constitutional rights. Rather, he looked only to the "range of policy considerations" which might affect the appropriateness of implying a damage remedy,[10] *id.* at 407, and specifically counselled the judiciary against making comparisons among various legally protected interests, *id.* at 410-11. That Congress had not spoken on the issue was no bar to vindication of constitutional rights.

The conclusion of the court below that some congressional activity in an area negates the presumptive availability of an implied cause of action under the Constitution is simply erroneous. Even were a federal statutory remedy or a state court remedy available to plaintiff, *Bivens* made clear that an implied constitutional cause of action in damages exists to remedy invasions of "personal interests in liberty."

b. *Bivens* held that a remedy in money damages need not be "indispensable" for a private cause of action to be implied.

The en banc majority's inquiries "whether the Constitution . . . *compels* an action for money damages implied from the Fifth Amendment Due Process Clause" (A. 49)

[10]It "would be at least anomalous to conclude that the federal judiciary — while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution . . . — is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens, supra*, 403 U.S. at 403-04 (citations omitted) (Harlan, J., concurring).

and "whether, in this case, a damage action is *indispensable* to [its] effectuation" (A. 55) (emphasis added) are in direct conflict with the standard articulated in *Bivens*.

In determining that a cause of action for money damages was implied under the Fourth Amendment, the Court expressly rejected the contention that an implied federal remedy in money damages be "necessary to enforce the Fourth Amendment." *Id.* at 397. The court ruled that a remedy in money damages need not be essential or indispensable or even "necessary" to effectuate constitutional rights generally:

> "[W]e cannot accept respondent's formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment . . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts . . . ." *Id.* at 397.

The Court buttressed this conclusion by noting that there was "no *explicit* congressional declaration" that persons so injured were *not* to recover damages, and suggested that any such affirmative congressional action would be constitutional only if an alternative "but . . . equally effective" remedy to redress violations of constitutional rights were provided. *Id.* at 397 (emphasis added).

The Court determined that an award of damages obtained for injuries violating the Fourth Amendment was both appropriate and "hardly . . . surprising." *Id.* at 395. Even though the Fourth Amendment does not precisely provide for its enforcement by award of money damages, the fact that damages have been historically regarded as the

"ordinary remedy" for this type of invasion, *id.*, and the fact that 28 U.S.C. §1331(a) provides a "general right to sue for such invasion," empowers the federal courts to "use any available remedy to make good the wrong done." *Id.* at 396.[11]

Justice Harlan reiterated this point. Having concluded that federal courts are empowered by 28 U.S.C. §1331(a) to grant damages, a traditional remedy at law, *id.* at 405-06, he then stated that the exercise of that power should depend on the "appropriate[ness]" of granting compensatory relief to remedy the injury. 403 U.S. at 407.

Justice Harlan did note that in some cases the appropriateness of money damages might vary with the nature of the personal interest asserted, *id.* at 409 n.9. He concluded, however, that

> ". . . some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court . . . . *For people in Bivens' shoes, it is damages or nothing.*" *Id.* at 409-10. (emphasis added.)

In plaintiff's case, a cause of action is clearly "appropriate," and indeed even "necessary," to vindicate her Fifth Amendment rights. She has no other remedy. Under *Bivens*, however, she need not even meet that exacting

[11]Section 1331(a) of Title 28 of the United States Code provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ."

standard.[12] She can "demonstrate an injury consequent upon the violation by federal agents of [her Fifth] Amendment rights. [She] is entitled to redress [them] through a particular remedial mechanism normally available in the federal courts." *Id.* at 397.

c. If a cause of action was implied in *Bivens*, where an adequate state remedy existed, *a fortiori* one must be implied here where there is no other remedy.

The facts argue even more strongly for a judicially created remedy in the instant case than in *Bivens*. There, the petitioner could have brought a tort action in state court against the federal agents who had infringed his Fourth Amendment rights. Plaintiff in this case has no cause of action under Louisiana law,[13] and she is foreclosed from equitable relief because defendant is no longer in office.[14] Her only means of vindicating her constitutional right is an

[12]Instead of looking to the "constitutional implication" criteria enumerated in *Bivens* for implication of a damages remedy, the court below relied heavily on the "statutory implication" criteria enumerated by this Court in Cort v. Ash, 422 U.S. 66 (1975), for implication of a cause of action under a federal statute. *See* pp. 26-49, *infra.* Although those more stringent criteria would still warrant implying a cause of action on the facts of this case, the court below erred in its choice of precedent.

See Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1551 (1972).

[13]The state court would have no authority to render relief against a United States Congressman. *See* Tarble's Case, 13 Wall 397 (1892). *Cf.* Testa v. Katt, 330 U.S. 386 (1947).

[14]*See* p. 4 & n.2, *supra.*

action for money damages arising directly under the Fifth Amendment. Implication of a cause of action, then, is particularly appropriate.

2. Nine Courts Of Appeals Have Applied *Bivens* To Constitutional Provisions Other Than The Fourth Amendment, And None Has Agreed With The Opinion Below.

These are precisely the considerations that have prompted nine courts of appeals to apply *Bivens* to claims arising under constitutional provisions other than the Fourth Amendment and to imply causes of action directly from them. Five circuits have specifically applied the *Bivens* rationale to actions arising under the due process provisions of either the Fifth or Fourteenth Amendments,[15]

[15]Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1364 (9th Cir. 1978), *amending on denial of rehearing*, 558 F.2d 928 (9th Cir. 1977) (Fifth Amendment); Gentile v. Wallen, 562 F.2d 193, 196-97 (2d Cir. 1977) (Fourteenth Amendment); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (Fifth Amendment) ("[N]othing said in *Bivens* would limit the application of the principles enunciated therein..."); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892, 893-94 (3d Cir. 1972) (Fifth Amendment Due Process and Fourth Amendment) ("[*Bivens*] recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations."). The Eighth Circuit's determination that a cause of action is implied under the Fourteenth Amendment and that a municipality may be sued for money damages under a vicarious liability theory, Owen v. City of Independence, 560 F.2d 925, 932-34 (8th Cir. 1977), was recently vacated and remanded for further consideration, 98 S. Ct. 3118 (1978), in light of this Court's holding that a municipality cannot be subjected to liability under a respondeat superior theory in Monell v. New York City Dept. of Social Services, 98 S. Ct. 2018 (1978). *See* n. 35, *infra*. *See*

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two of them subsequent to the decision below.[16] These courts have concluded that "the due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment," and that "[n]othing in *Bivens* warrants limitation to Fourth Amendment claims . . . ." *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1364 (9th Cir. 1978), *amending on denial of rehearing*, 558 F.2d 928 (9th Cir. 1977). "*Bivens*, if anything, established that damages could flow from injuries caused by an invasion of other constitutional provisions." *Turpin v. Mailet*, 579 F.2d 152, 157 (2d Cir. 1978) (en banc). The courts that have applied *Bivens* to claims arising under other constitutional provisions[17] have been unwilling to conclude, as the court

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also Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (Fourth and Fifth Amendments). *Cf.* Bennett v. Campbell, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of *Bivens* claims under Fourth and Fifth Amendments); Gray v. Union County Intermediate Education District, 520 F.2d 803, 805 (9th Cir. 1975) (assuming availability of cause of action for back pay and damages for violation of First Amendment and due process rights).

[16]Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978); Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc). *See* Jones v. City of Memphis, No. 77-1704 (6th Cir. Sept. 19, 1978) (slip op. at 3) (reiterating availability of implied cause of action under Fourteenth Amendment; holding limited to respondeat superior liability of municipality).

[17]Four other circuits have either applied *Bivens* to claims arising under constitutional amendments other than the Fourth, Fifth, or Fourteenth or have indicated their willingness to do so. The District of Columbia and Sixth Circuits have not yet confronted the due process question, but both courts have applied the *Bivens* rationale to First Amendment actions. *See* Dellums v. Powell, 566 F.2d 167, 194-95

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below would do, that one constitutional right deserves

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(D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 3146 (1978); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975). The Third Circuit has also upheld a cause of action under the First Amendment. *See* Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975). *See also* Payne v. District of Columbia, 559 F.2d 809, 818-19 & nn.49-50 (D.C. Cir. 1977) (Fifth Amendment jurisdiction, recognizing availability of cause of action); Sullivan v. Murphy, 478 F.2d 938, 965 & n.47 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973) (Fourth and Fifth Amendment jurisdiction, stating availability of cause of action). The Seventh and Tenth Circuits have not yet directly confronted the question of implying causes of action under amendments other than the Fourth, but both have indicated their willingness to do so. *See* McDonald v. Illinois, 557 F.2d 596, 604 (7th Cir.), *cert. denied*, 98 S. Ct. 508 (1977) (denying relief on vicarious liability theory but stating, "A cause of action (without benefit of 42 U.S.C. §1983) may be implied in favor of one who suffers injuries as a result of a government agent's violation of the Constitution"); Cannon v. University of Chicago, 559 F.2d 1063, 1082 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 3142 (1978) (denying implied remedy under a federal statute but indicating result would have differed had case involved a fundamental constitutional right for which Congress had provided no remedy); Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 718 n.7 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976) (suggesting availability of cause of action under Fourteenth Amendment); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 576-77 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (Fourteenth Amendment due process jurisdiction, implying availability of cause of action); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931-32 & n.5 (10th Cir. 1975) (equal protection and due process jurisdiction, presuming availability of cause of action) (Bell v. Hood, *supra*, and *Bivens* "did not limit a constitutional action to a Fourth Amendment violation ...").

The Fifth Circuit, prior to its en banc decision in plaintiff's case, had found jurisdiction present where *Bivens*-type actions were brought under constitutional provisions other than the Fourth Amendment. (A. 47.) *See* Reeves v. City of Jackson, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under Eighth Amendment and/or Fourteenth Amendment, granting jurisdiction); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976) (Fifth Amendment jurisdiction); *see also*

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greater or less protection than another.[18]

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Roane v. Callisburg Independent School District, 511 F.2d 633, 635 n.1 (5th Cir. 1975); United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 801-02 n.2 (5th Cir. 1974); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). *But see* Rodriguez v. Ritchey, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 894 (1978) (declining to address *Bivens* issue).

The one remaining court of appeals — the First Circuit — has refused to imply a cause of action against a municipality under the Fourteenth Amendment. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977). However, as Judge Goldberg noted in his dissent below, (A. 90), that case involved a municipal "deep pocket defendant," sued under a vicarious liability theory. The First Circuit held that plaintiff could maintain an action under 42 U.S.C. §1983 against those persons directly responsible for his injuries and rested its decision on the adequacy of that remedy. (This situation will no longer arise, given this Court's recent decision in Monell v. New York City Dept. of Social Services, *supra*. *See* n.35, *infra*.)

These are not all of the cases in which courts of appeals have touched upon the *Bivens* issue. Rather, these are the cases that have addressed the *Bivens* question most directly. An overwhelming number of district courts have also applied the *Bivens* rationale to claims arising under constitutional provisions other than the Fourth Amendment. *See, e.g.*, Gardels v. Murphy, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) ("*Bivens* recognizes a cause of action for damages for violations of any constitutionally protected interest"); Rodriguez v. Barcelo, 358 F. Supp. 43, 48 (D.P.R. 1973) ("if [defendants] are federal employees, then, under *Bivens*, there is an action whenever a federally guaranteed right is violated"); Washington v. Brantley, 353 F. Supp. 559, 563-64 (M.D. Fla. 1972) ("*Bivens* recognizes a cause of action for *any* constitutionally protected interest"). *See also* Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa. 1975) (First and Fourteenth Amendments); Peacock v. Board of Regents, 380 F. Supp. 1081 (D. Ariz. 1974), *aff'd*, 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975) (First Amendment); Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973) (Eighth Amendment); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973) (First, Fourth and Fifth Amendments).

[18]The Third Circuit considered the "linguistic difference" between the Fourth and First Amendments in holding that a *Bivens* cause of

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In applying *Bivens* to a Fourteenth Amendment claim against a municipality, the en banc Second Circuit stated that in implying a remedy the court was doing nothing more than fulfilling its traditional common law function. The criteria used to make that determination were those articulated in *Bivens*, rather than those identified in *Cort v. Ash*, 422 U.S. 66 (1975), and erroneously applied in the instant case by the court below. The Second Circuit concluded that it need only determine whether the remedy requested is "appropriate" to the vindication of the right asserted. "When one analyzes *Bivens*, he is driven to the conclusion that *Bivens* decided that precise issue. The Court refused to accept the premise that a remedy must be necessary or indispensable to warrant its implication." *Turpin v. Mailet, supra*, 579 F.2d at 157.

A remedy in money damages is "appropriate" to redress plaintiff's constitutional rights in the instant case. As Justice Harlan concluded, "For people in [plaintiff's] shoes, it is damages or nothing." 403 U.S. at 410.

3. *Bivens* Applies To Members Of Congress In The Same Way It Applies To All Other Federal Officials.

Nothing in *Bivens* limits its application to agents of the Federal Bureau of Narcotics or executive branch officials

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action was implied under the latter. Paton v. La Prade, 524 F.2d 862, 869 (3d Cir. 1975). Although the Fourth Amendment — like the Fifth — is addressed to the rights of citizens, the First is expressed as a limitation on Congress. Nonetheless, the rights were deemed equally "personal" to an individual, and money damages were therefore an appropriate remedy for their invasion. *Id.* This Court need not address that issue in the present case.

generally. The core issue in *Bivens* was not the nature of the office of the defendant, but rather the nature of the right asserted by the plaintiff. This Court's analysis is applicable to any federal officer.[19]

In rejecting the argument that the Fourth Amendment established no different relation between the parties than had both been private citizens, this Court rested its conclusion on the broad ground that "power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 391-92.

A member of Congress, like an executive branch official, acts "in the name of the United States." Abuse of power — unconstitutional sex discrimination — by a member of Congress carries with it far greater potential for injury than does the same activity by a private individual.[20] When federal power has been used in an impermissible, indeed *ultra vires*, fashion, a federal remedy must be provided to redress the wrong done.

The Constitution does not provide members of Congress with greater or different rights than any individual or any other federal official. Members of Congress swear to

[19]It would be anomalous to hold otherwise. A private cause of action against all state officials for invasion of constitutional rights exists under 42 U.S.C. §1983. This provision includes state legislators as well as state executive branch officials. *Bivens* must be read to reach the same result for all officers of the federal government. See pp. 39-41, *infra*.

[20]Such discrimination by a private employer would in most cases subject the offending individual to a private suit for damages in federal court. Plaintiff has no such remedy here.

"protect and defend" the Constitution, 5 U.S.C. §3331, and have never been deemed to stand above the law they create. *Gravel v. United States*, 408 U.S. 606, 615 (1972). The Constitution does provide members of Congress *immunity* from suit if the challenged activity falls within the ambit of the Speech or Debate Clause, art. 1, §6, but the question whether such immunity is available to defendant in the instant case is entirely separate from whether a *Bivens* cause of action is available to a plaintiff. *See* pp. 50-68, *infra*.[21] No court has premised implication of a *Bivens* remedy upon the office of the defendant and there is no reason to do so now.

D. Although The "Statutory Implication" Criteria Articulated By This Court In *Cort v. Ash* Are Inapplicable In A Case Involving A Violation Of The Constitution, The Instant Case Nonetheless Satisfies Each Of Those Criteria.

The court below erroneously applied the "statutory implication" criteria articulated in *Cort v. Ash*, 422 U.S. 66 (1975), rather than the "constitutional implication" criteria articulated in *Bivens*. This in itself is sufficient grounds to reverse the lower court decision and remand the case for trial on the merits.

Even if the more stringent *Cort* criteria were deemed to be relevant in the instant case, however, a private cause of action would nonetheless properly be implied. In *Cort*, this

[21]The *Bivens* Court did not consider whether respondents were immune from liability by virtue of their official position. *Bivens, supra*, 403 U.S. at 397-98.

Court declined to imply a stockholders' derivative suit for money damages from a criminal statute which was not designed to define the internal relationships between corporations and stockholders. *Id.* at 78-82. In so deciding, the Court articulated four criteria "relevant" to making this determination:

(1) Is the plaintiff "one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff;"
(2) Is there indication of legislative intent to create or deny a remedy;
(3) Is implication of a remedy consistent with the underlying purposes of the legislative scheme; and
(4) Is the cause of action traditionally relegated to state law in an area basically the concern of the state so that it would be "inappropriate" to infer a cause of action based solely on federal law.

Plaintiff satisfies each criterion in the instant case.

1. Plaintiff Is One Of The Class For Whom The Fifth Amendment Was Enacted.

A federal right exists in the plaintiff. Thus, the first *Cort* standard, which has been "central to all implication cases, from the first statutory implication decision in which it was originally formulated, *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), through to *Bivens* and more recent statutory cases" (A. 83), is satisfied.

Cort confirmed that "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated

federal right in the plaintiff, . . .*or* a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," 422 U.S. at 82 (citations omitted) (emphasis added).

The court below acknowledged that the Fifth Amendment Due Process Clause "certainly confers a right upon Davis" (A. 50), but then erroneously concluded that infringement of this right must, if a cause of action is to be implied, somehow be as "direct" as that to Bivens' Fourth Amendment rights.[22] *Id.* The equal protection component of the Fifth Amendment guarantees petitioner the "absolute right" to be free from unconstitutional sex discrimination carried out by virtue of federal authority to the same extent the Fourth Amendment guaranteed Bivens the "absolute right to be free from unreasonable search and seizures carried out by virtue of federal authority," *Bivens, supra*, 403 U.S. at 392. Neither right can be regarded as more important or more jealously to be guarded.

The Bill of Rights was enacted expressly for the purpose of protecting citizens from the unwarranted exercise of federal authority. Its terms confer an "especial" right in the plaintiff as required by *Cort, supra*, 422 U.S. at 78, 82. That *Cort* relies on *Bivens* as precedent for this paramount criterion in the implication of damage remedies from federal statutes demonstrates that causes of action are particularly appropriate in the case of violations of constitutionally protected interests.

[22]If the court below meant to suggest some kind of distinction between physical and nonphysical intrusions, that distinction is incorrect. Although this Court once distinguished Fourth Amendment violations on that basis, that line of cases has been overruled. Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961).

2. The "Legislative Intent" Of The Framers Supports Implication Of A Cause Of Action Here.

The intent of the Framers of the Fifth Amendment supports the implication of a cause of action here. In considering the "legislative intent" criterion articulated in *Cort v. Ash* for implication of remedies from federal statutes, the court below erred in relying on what it perceived to be the congressional intent manifested in the enactment of subsequent legislation.

"Legislative intent" either to create or to deny a remedy, 422 U.S. at 82-84, or to reveal the purposes of the legislative scheme, *id.* at 84, simply does not exist with respect to the provisions of the Constitution.[23] There is no specific, contemporary legislative history surrounding the adoption of the Fifth Amendment. *See Cort v. Ash, supra*, 422 U.S. at 82, 83.

To look to statutory schemes subsequently enacted, and thus to divine "congressional intent" respecting the Fifth Amendment from the remedial mechanisms provided by those statutes, as the court below would do, is to subvert the underlying purposes of the Amendment and the intent of the

[23]It would, moreover, be particularly anomalous to impose, as the court below would do, a more stringent standard for implication of causes of action from constitutional provisions than that for implication from federal statutes.

> ". . . the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." *Bivens, supra*, 403 U.S. at 407 (Harlan, J., concurring.)

Framers in enacting it. Indeed, that statutory inquiry is "simply irrelevant" where no alternative remedy has been made available.[24] (A. 78; Goldberg, J., dissenting.) "There is *no* suggestion in *Bivens* that Congress can negate the existence of *every* remedy which might vindicate a constitutional right." (A. 85; Goldberg, J., dissenting) (emphasis in original).[25]

The only truly relevant "legislative history" is the intent of the Framers of the Fifth Amendment. The court below, in denying plaintiff a cause of action for redress of constitutional violations, failed even to consider the intent of the Framers in enacting the Bill of Rights. Unquestionably, however, the Framers did not intend that the Bill of Rights establish rights with no remedies.[26]

[24]Even if Congress had enacted some kind of remedial scheme, plaintiff would still have an implied cause of action directly under the Constitution. The court would then be guided, in deciding whether to recognize a constitutionally based damage remedy, by *this* expression of legislative intent. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-417 (1968) (enactment of Civil Rights Act of 1964 providing certain remedies had no bearing upon litigation under 42 U.S.C. §1982).

[25]Moreover, no such negative intent need be imputed to Congress.

> "[T]he traditional deference of Congress to the Supreme Court in safeguarding individual liberties makes it both less likely that Congress will act affirmatively to implement the Bill of Rights, and improbable that congressional silence indicates a desire to retain state law."

Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 18-19 (1975).

See also Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572, 590 (1976): ". . . Congress appears to have left the question of the personal rights to be accorded [appellees] to orderly development by this Court and to whatever further provision Congress itself might make for them.

[26]This Court has declined to limit the applicability of 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), in cases

(continued)

The first ten amendments to the Constitution were enacted for the very purpose of preventing encroachment upon individual rights by the federal government, and especially by the legislative branch.[27] By incorporating them into the Constitution rather than leaving their codification to state governments,[28] the Framers sought to

(footnote continued from preceding page)

of deprivation of constitutional rights by persons acting under color of Puerto Rico territorial law. Examining Board of Engineers, Architects and Surveyors v. Otero, *supra.* The Court held that to so decide would mean that "Congress, although providing rights and remedies, could be said to have failed to provide a means for their enforcement." 426 U.S. at 586. The case for judicial enforcement is even stronger when the Bill of Rights is involved.

[27]"[T]he great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights . . . ." 1 *Annals of Cong.* 450 (Gales & Seaton eds. 1789) (hereinafter "*Annals*"). (James Madison before the 1st Congress, 1st Session.) Conferring far-reaching powers upon the federal government was perceived as a grave danger by many Americans who viewed state governments as the defenders of popular liberty and the proper repositories of the great powers of government. Nearly all of the state ratifying conventions passed resolutions recommending amendments guaranteeing various rights against infringement by federal authority. From these resolutions, James Madison drafted the bill he presented to Congress on June 8, 1791.

In presenting the Bill of Rights to Congress, Madison stated:

> "In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker. *It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control.*" *Annals* at 454 (emphasis added).

[28]Madison observed that leaving fundamental guarantees of the Bill of Rights to the idiosyncracies of state governments was "too uncertain ground to leave this provision upon . . . ." *Annals* at 456.

ensure that the judiciary would defend the Bill of Rights guarantees. Madison said:

> "If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[29]

The court below erred by failing to recognize the mandate of the Framers to check the exercise of power by the federal legislature. *See Bivens, supra*, 403 U.S. at 392.

3. The Underlying Purpose Of The Fifth Amendment Supports Implication Of A Private Cause Of Action Here.

Since an implied cause of action is consistent with the underlying purpose of the Fifth Amendment, this case also satisfies the third *Cort* criterion.

The importance of the Fifth Amendment in protecting individual rights is readily apparent.[30] Without a means of enforcing them, however, the Fifth Amendment guarantees become only an exhortation which may be discarded at will. Implication of a private cause of action to enforce the Fifth Amendment is therefore entirely consistent with its under-

[29] *Annals* at 457.

[30] Courts of appeals have expressly distinguished interests protected by the Constitution from those protected by common law. *E.g.*, Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, 294 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 3144 (1978), citing *Bivens*. *See also* Butz v. Economou, 98 S.Ct. 2894, 2905 n.22 (1978) (holding expressly limited to constitutional contentions).

lying purpose. As this Court observed in *Bivens*, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395. In the instant case, indeed, a private cause of action is the *only* means of implementing the intent of the Fifth Amendment.[31]

The court below never specifically stated why a remedy in money damages is not consistent with the underlying purpose of the Fifth Amendment, or why such a remedy should not be implied on these facts.[32] Instead, it concluded that the potential number of cases that might be generated was sufficiently troublesome to preclude finding a cause of action for violation of plaintiff's constitutional rights. This approach conflicts with the purpose of the Fifth Amendment.

In erroneously relying on docket considerations, the court below gave short shrift to the expertise of the federal courts in determining when cases are appropriately relegated to state tribunals, when constitutional claims have been adequately stated, and when facially adequate claims may be disposed of before trial. None of these reasons comports with the third criterion articulated by this Court in *Cort*.

[31] Congress has taken *Bivens* to be law and expanded it by enacting a statutory "counterpart". The 1974 amendment to the Federal Tort Claims Act, 28 U.S.C. § § 1346(b), 2680(h), provided a cause of action against the United States for certain intentional torts of federal investigative and law enforcement officers. A *Bivens* action already existed against the offending officials themselves. S. Rep. No. 588, 93rd Cong., 1st Sess. 2-3 (1973).

[32] The court ignored the teachings of other federal courts which, in making this determination, had looked to the standard in 42 U.S.C. § 1983 since a "*Bivens*-type cause of action is the federal counterpart to claims under [that statute]." Paton v. La Prade, 524 F.2d 862, 871 (3rd Cir. 1975). *See* pp. 39-41, *infra*.

4. Plaintiff's Claim Here Raises Traditional Federal Issues And Is Not A State Concern Controlled By State Law.

Plaintiff's claim here asserts a right that is traditionally federal and that is not so basically the concern of the state that it would be "inappropriate" to infer a cause of action based solely on federal law. 422 U.S. at 78. Thus, the fourth *Cort* criterion is satisfied, and a federal cause of action is properly implied.[33] *Cort* looked to *Bivens* as authority for this proposition, *id. Bivens* thoroughly considered the appropriateness and the adequacy of relegating federal constitutional claims to state courts and rejected that approach because of the vagaries and limitations of state law. *Bivens, supra,* 403 U.S. at 394-395; *id.* at 400 (Harlan, J., concurring).

The instant case involves blatant sex discrimination by a United States Congressman, violative of the Constitution. Surely there could be no more peculiarly "federal" concern, nor a more "federal" cause of action which would require determination of federal constitutional principles.[34]

[33]The "statutory implication" standard first articulated in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), was whether a remedy is "necessary" and "appropriat[e]," 377 U.S. at 433, 434, to effectuate the federal statute. In *Bivens,* this Court declined to require that the "constitutional implication" standard be whether the remedy was "necessary to enforce the Fourth Amendment." 403 U.S. at 397. This Court articulated the current "statutory implication" standard in *Cort:* the remedy must be consistent with the purpose of the legislation and not "inappropriate" as a basis for a federal cause of action. 422 U.S. at 78.

[34]The elimination of the jurisdictional amount requirement for certain suits against the United States is another indication of congressional intent that federal claims be heard and remedied in the federal forum. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13-17 (1976).

Although the court below acknowledged that "the particular circumstances of the case at bar raise questions of federal rights in federal employment" (A. 54), it concluded that docket control of the federal judiciary warranted refusal to imply a cause of action for damages. (A. 54-55.) The specter of federal court jurisdiction over "every legally cognizable tortious injury inflicted by persons acting under color of federal law" led the court below to the erroneous determination that even those litigants who have no other remedy should be barred from relief in federal court. *See Bivens, supra,* 403 U.S. at 410-11 (Harlan, J., concurring).

In the seven years since *Bivens* was decided, many federal courts have applied *Bivens* to causes of action arising from both Fifth and Fourteenth Amendment violations[35] as well as those arising under other amendments. *See* pp. 20-24 and nn. 15-17, *supra.* The "avalanche," which also concerned the dissenting Justices in *Bivens,* 403 U.S. at 428, 430, has

[35]Fourteenth Amendment *Bivens* actions have frequently been implied against municipalities or other agencies of local government that were previously held not to be "persons" in Monroe v. Pape, 365 U.S. 167 (1961), and therefore were not subject to suit under 42 U.S.C. § 1983. This Court assumed, without deciding, that this implication was appropriate. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 278 (1977).

Implication of such causes of action will no longer be necessary because this Court in Monell v. New York City Dept. of Social Services, 98 S.Ct. 2018 (1978), recently overruled that aspect of Monroe v. Pape, *supra. Monell* permits suits under 42 U.S.C. § 1983 against municipalities, except those based on vicarious liability theories, for alleged unconstitutional actions implementing government policy or custom. This decision eliminates the need to bring *Bivens* claims under the Fourteenth Amendment that would previously not have been cognizable under 42 U.S.C. § 1983. Thus the fear of the court below, insofar as it concerned an increased number of Fourteenth Amendment claims (A. 54, 55), is groundless. *See also Bivens, supra,* 403 U.S. at 391 n.4.

not materialized. The cases decided under these causes of action have vindicated the federal civil rights of the litigants without unduly burdening the federal forum.

Because of their vast experience in equal protection litigation, federal civil rights actions, and federal employment discrimination suits, the federal courts are particularly qualified to decide this kind of question. Frivolous and immaterial cases can be decided by either motions to dismiss or summary judgment. *Bell v. Hood,* 327 U.S. 678, 682 (1946); *Bivens, supra,* 403 U.S. at 391, 410-411. The Court should not presume that members of Congress will disregard their constitutional obligations. Only those relatively few cases that are truly meritorious will and properly should draw upon the time and resources of the federal judiciary.

To the extent the defenses of a member of Congress must be analyzed for immunity or liability purposes, that analysis is best undertaken in a federal context. *Bivens, supra,* 403 U.S. at 409 (Harlan, J., concurring). The federal court is the only "appropriate" forum for the resolution of these issues. The citation to *Bivens* in *Cort,* 422 U.S. at 78, is persuasive authority for this proposition.

E. Although "Congressional Intent" As Determined By Subsequent Enactment Of Legislation Is Irrelevant In Determining Whether A Private Cause Of Action Exists Under The Constitution, Congress Has In Fact Made Clear Its Policy Prohibiting Sex Discrimination By Its Members.

It is the intent of the Framers of the Constitution that must control in determining whether a private damage action is

implied under the Fifth Amendment in this case. *See* pp. 29-32, *supra*, and *Bivens, supra,* 403 U.S. at 396. The court below thus erred in relying upon its interpretation of the intent reflected in more recent statutes.

The error of the lower court is compounded by its failure to consider the statutes most directly on point. Those establish a clear congressional policy against sex discrimination by a member of Congress and are entirely consistent with the implication of a private cause of action in this case.

1. 5 U.S.C. § 7151 Prohibits Sex Discrimination By A Member Of Congress.

The policy of Congress with respect to discrimination is unambiguously enunciated in 5 U.S.C. § 7151:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, *sex,* or national origin" (emphasis added).

This provision, enacted in 1966,[36] applies to all federal government "employees," including employees of Congress, except the military.[37] Defendant's conduct in this case directly contravenes this statutory policy.

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[36]Pub. L. No. 89-554, 80 Stat. 523.

[37]The term "employee" as used in 5 U.S.C. §7151 is defined in 5 U.S.C. §2105(a)(1)(B) to mean:

> "... an individual who is — (1) appointed in the civil service by one of the following acting in an official capacity —
>
> * * *
>
> (B) a Member or Members of Congress, or the Congress . . . ."

In turn, 5 U.S.C. §2101(1) defines the term "civil service" as used in 5 U.S.C. §2105(a)(1) to include:

> ". . . all appointive positions in the executive, judicial, and legislative branches of the Government of the United States . . ."

2. House Rule XLIII And Senate Rule L(50) Prohibit Sex Discrimination By A Member of Congress.

Both houses of Congress have passed rules, binding on their members, that prohibit sex discrimination.[38] House Rule XLIII, § 9 provides:

> "A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex* or national origin." (emphasis added.)

Senate Rule L(50) provides:

> "[N]o Member, officer, or employee of the Senate shall, with respect to employment by the Senate, or any office thereof — fail or refuse to hire an individual; discharge an individual; or otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, *sex*, national origin, age, or state of physical handicap." (emphasis added.)

Defendant's action in discharging plaintiff expressly and solely on the basis of her sex also directly contravenes the Rules of the House of Representatives.

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[38]Neither branch has passed a resolution implementing these rules. Efforts to do so have uniformly failed. *See* Reply and Supplemental Reply of Petitioner on Petition for Writ of Certiorari for documentation and analysis of these defunct resolutions.

3. The Decision Of The Court Below Contravenes Congressional Intent Reflected In The Enactment Of 42 U.S.C. § 1983 And 28 U.S.C. § 1331(a).

Not only did the court below ignore the controlling provisions of 5 U.S.C. § 7151 and the Rules of the House of Representatives, but it failed to consider the fact that its decision cannot be reconciled with the intent of other important statutes establishing federal causes of action against state officials for constitutional violations, 42 U.S.C. § 1983,[39] and the jurisdiction of the federal judiciary to entertain any case that "ari[ses] under the Constitution," 28 U.S.C. § 1331(a).[40] As a consequence of the decision

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[39]42 U.S.C. § 1983 (1970), originally included as section 1 of the Civil Rights Act of 1871, provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[40]The Act of March 3, 1875 is the predecessor to 28 U.S.C. §1331(a), the broad jurisdictional grant to the federal courts under which *Bivens* causes of action are entertained. Although there is virtually no legislative history of the Act, it is well settled that, by that statute, "Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts . . . became the *primary* and powerful reliances for vindicating *every right given by the Constitution*, the laws, and treaties of the United States." Frankfurter & Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1927) *quoted in* Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis added in part). *See also id.* at 246-47 n.8. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Id.* at 248. *Accord,* District of Columbia v. Carter, 409 U.S. 418, 427-29 (1973); Lynch v. Household Finance Co., 405 U.S. 538, 546-48 (1972).

below, federal legislators would be immune from suits for conduct violating this constitutional mandate but state legislators would not.[41] A federal statutory remedy exists only against the latter, under the authority of 42 U.S.C. § 1983. This anomalous result would wholly distort the intent of the Framers of the Bill of Rights and that of Congress in enacting 42 U.S.C. § 1983.

The legislative history of that statute demonstrates that it was intended to extend the same rights and remedies to victims of constitutional violations by state officers — "whether that action be executive, legislative, or judicial"[42] — as were already available against federal officials.[43] In

[41]State legislators are, of course, absolutely immune from liability for actions within the legislative sphere of legislative activity under the Speech or Debate Clause of the United States Constitution. Tenney v. Brandhove, 341 U.S. 367 (1951). *See* pp. 50-68, *infra*. When their conduct is not so protected, however, they are subject to suit under 42 U.S.C. §1983. Ammond v. McGahn, 390 F. Supp. 655 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325 (3d Cir. 1976) (§1983 actions for First and Fourteenth Amendment violations permissible against twenty-eight New Jersey state senators and other legislative officials). *See also* Johnson v. Reagan, 524 F.2d 1123, 1124 (9th Cir. 1975); Parker v. McKeithen, 488 F.2d 553, 555 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974), Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973), all holding 42 U.S.C. § 1983 applicable to state legislators but granting immunity from suit since the contested activities fell within the ambit of the Speech or Debate Clause.

[42]Mitchem v. Foster, 407 U.S. 225, 242 (1972), *quoting* Ex Parte Virginia, 100 U.S. 339, 346 (1879).

[43]This Court has recently refused to "draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 98 S.Ct. 2894, 2909 (1978) (holding federal officials entitled to qualified, rather than absolute, immunity from suits charging unconstitutional conduct). This rule is equally applicable in the instant case.

passing § 1983, Congress believed it was *"really re-enacting the Constitution." Cong. Globe,* 42d Cong., 1st Sess. 569 (1871) (emphasis added).[44] "There is no reason to allow federal officials to act with impunity in this context and to bar state officials. The damage to the individual's [constitutional] interests is the same regardless of the perpetrator of the violation." *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (upholding a *Bivens* cause of action under the First Amendment).

Citing *Paton v. La Prade, supra,* this Court has echoed that analysis in *Butz v. Economou, supra.* "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983 .... To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." 98 S.Ct. at 2907-8, 2909.

This same reasoning requires that defendant be held accountable for his unconstitutional action in the instant case in the same way as any state legislator.

4. The Lower Court Misinterpreted The Civil Rights Act Of 1964.

The court below erred in relying heavily on the fact that "Congressional remedial legislation for employment discrimination [Title VII of the Civil Rights Act of 1964, as

[44]*See* note 40, *supra.*

amended][45] has carefully avoided creating a cause of action for money damages for one in Davis' position." (A. 50.) It also erred in concluding that implication of a cause of action here would grant petitioner a remedy "far more extensive" than that available to federal employees in the competitive service whom Title VII covers, and reasoning that "Congress [could not] have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection." (A. 51-2.) Both conclusions are unwarranted.

There is no question that Title VII, by its silence on this subject, does not apply to plaintiff.[46] There is also no question that, by its silence, Congress cannot be deemed to have precluded a constitutional remedy for violation of plaintiff's Fifth Amendment rights. Congress can neither by silence nor by statute negate all remedies for violations of constitutional rights. *Turpin v. Mailet, supra,* 579 F.2d at 163. Although Congress may be free to create alternative remedies that are equally effective, in its judgment, as those the courts would provide for vindication of Fifth Amendment rights, *Bivens, supra,* 403 U.S. at 397, Congress cannot revoke the applicability of the Bill of Rights or eliminate all remedies for its violation. The Constitution is not merely a federal statute. Congress is not free to deny constitutionally-granted rights.

The conclusion of the lower court that Congress intended plaintiff to remain remediless for unconstitutional dis-

[45]42 U.S.C. §2000(e) *et seq.*.

[46]This Court has decided that where Title VII provides a remedy, that remedy is exclusive. Brown v. General Services Administration, 425 U.S. 820 (1976). It has also decided that Title VII has no effect where it does not provide a remedy. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (according non-Title VII judicial remedy for claim of federal employment discrimination).

crimination because implication of a cause of action would grant her a "far more extensive" remedy than that accorded under Title VII (A. 51) is patently without merit. Title VII eliminates the sovereign immunity bar, permitting federal judicial actions and back pay recovery directly against the United States. It also affords plaintiffs a range of equitable relief and establishes an expeditious administrative process. In the instant case, plaintiff's claim is limited to money damages after trial. Thus, her remedy is less extensive than would be available under Title VII.

Nor is the comparison relied upon by the court below a permissible approach to constitutional analysis. If followed, it could sanction violation of constitutional rights by any employer to whom Title VII does not apply. *Bivens* expressly forbids this kind of distinction. 403 U.S. at 410-11 (Harlan, J., concurring). No government official can be free to violate the constitutional rights of any employee. *Butz v. Economou,* 98 S.Ct. 2894, 2905 (1978).

Where the Constitution compels some effective remedy for its violation, Congress' inaction in providing a statutory cause of action for noncompetitive congressional employees cannot foreclose the implication of an appropriate remedy under *Bivens.* Had Title VII or any other statute afforded relief for invasion of plaintiff's Fifth Amendment rights, the statutory methodology should be followed; but where the statute does not attempt to provide a remedy for this intrusion, the statute cannot be used to eliminate the constitutional right.

Many federal courts have implied *Bivens* causes of action under the Fourteenth Amendment against municipalities and agencies of local government for violations of litigants'

constitutional rights.[47] The courts have created this remedy in the absence of a statutory cause of action under 42 U.S.C. § 1983, which, coupled with 28 U.S.C. § 1343(3), provides a federal civil rights action against every "person" acting under color of state law. In *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961), this Court decided that the cause of action provided against "persons" by § 1983 did not include a cause of action against a municipality, looking both to contemporary legislative history surrounding the Civil Rights Act of 1871 and to subsequent legislative efforts to amend that provision expressly to bring municipalities into its ambit. The federal courts, however, have refused to deny civil rights litigants a cause of action against municipalities for violation of constitutional rights merely because that statute had been construed as providing no remedy.[48]

That reasoning is directly applicable in the instant case. The fact that Title VII does not provide a remedy cannot

[47]*See, e.g.*, Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc); Reeves v. City of Jackson, 532 F.2d 491 (5th Cir. 1976); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Gray v. Union County Intermediate Education District, 520 F.2d 803 (9th Cir. 1975). One recent decision, Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), has been vacated and remanded for consideration in light of Monell v. New York City Dept. of Social Services. *See* n. 35, *supra*.

[48]See the lengthy discussion of this issue in *Turpin v. Mailet, supra*, 579 F.2d at 160-66. The en banc court stated that if it accepted the argument that §1983 precluded implication of a remedy against a municipality for constitutional violations it "would be forced to accept the objectionable concept that Congress' failure to provide a remedy for every conceivable constitutional violation demonstrates a belief by Congress that certain injustices must remain unredressed." Turpin v. Mailet, *supra*, 579 F.2d at 162.

prohibit this Court from implying one to vindicate Fifth Amendment violations.[49]

5. 2 U.S.C. § 92 Does Not Authorize A Member Of Congress To Engage In Unconstitutional Discrimination.

Neither can the broad provision regarding discharge of congressional staff in 2 U.S.C. § 92[50] buttress the conclusion of the court below that Congress has foreclosed judicial remedy for constitutional violations in employment.[51] The fact that a member of Congress is permitted by 2 U.S.C. § 92 to discharge his employees "without cause" does not mean he is permitted to commit unconstitutional sex discrimination in discharging a secretary. Members of Congress must of course have wide latitude in staffing determinations. Nowhere, however, does 2 U.S.C. § 92 purport to authorize action that flagrantly violates basic

[49]That Monell v. New York City Dept. of Social Services makes the necessity for implication of this Fifth Amendment cause of action moot, *see* n.35, *supra*, does not negate the aptness of the analogy.

[50]2 U.S.C. §92 provides generally for the "payment of appropriations for clerk hire for Members, Delegates, and Resident Commissioners" of the House of Representatives and the number of such "clerks" to which each is entitled. Its proviso states "[t]hat such persons shall be subject to removal at any time by such Member, Delegate, or Resident Commissioner with or without cause."

[51]Defendant conceded this point before the district court:

> "Defendant respectfully submits that in the face of such clear statutory language [2 U.S.C. §92], the only limitation which conceivably could be imposed upon defendant's right to discharge plaintiff is a constitutional one." Reply to Plaintiff's Memorandums in Opposition to Defendant's Motion to Dismiss. (R. 49.)

constitutional rights. That defendant could have dismissed plaintiff at any time without violating the Constitution cannot preclude awarding her damages for a dismissal that was in actuality unconstitutional. *See Perry v. Sindermann,* 408 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1972) (nontenured teachers may be dismissed without cause, but *not* for reasons infringing constitutional interests). *Cf. Silver v. New York Stock Exchange,* 373 U.S. 341, 365 n.18 (1963).

Of course, not all job selection criteria constitute prohibited "discrimination." Job qualifications that are "reasonably related" to the work involved are readily justified.[52] It is also entirely possible that some job criteria would be permitted under 2 U.S.C. § 92 for a member of Congress that would be prohibited "discrimination" for others, because of the unique role of elected representatives under the Constitution. Members of Congress are elected to represent a particular geographical district and a particular political party, and their employment of persons only from

[52]In adjudicating claims under Title VII, this Court has established "job-relatedness" as one criterion of the "business necessity" defense to otherwise impermissible discrimination practices. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Prior to the 1972 amendments to Title VII that brought certain public employers into its scope, many employment discrimination suits against those employers were brought as Fourteenth Amendment equal protection suits, under 42 U.S.C. § § 1981 and 1983 causes of action. In choosing a standard to apply in the constitutional situation, virtually every court rejected standard "equal protection analysis" and instead looked to the "job-relatedness" standard evolving in the Title VII context. *E.g.,* Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), *appeal after remand,* 497 F.2d 1113 (1974), *cert. denied,* 421 U.S. 991 (1975). That analogy is equally appropriate here.

their district and political party could thus be regarded both as "reasonably related" to the work involved and as appropriately reflecting their peculiar historical and constitutional function.[53]

Those situations, however, are clearly distinguishable from the instant case. Whatever might be said about uniquely "political" discrimination by a member of Congress has no bearing upon discrimination relating to sex. Sex, like race and national origin, is a classification subject to close judicial scrutiny because it is "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). Regardless of which standard is used to test equal protection, there can be no question that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . .' [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* (citations omitted). This kind of characteristic has "too often been inexcusably utilized to stereotype and stigmatize politically powerless segments of

[53]*See* Remarks of Senator Glenn during the debate concerning S. Res. 431, proposed as an amendment to the Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887. That resolution would have provided an administrative remedy for discrimination complaints of certain Senate employees. The Senator made clear, as did the Report of the Committee on Governmental Affairs, that geographical preferences and political party choices were permissible and could not be construed as evidence of discrimination. 124 Cong. Rec. S18228 (daily ed. October 11, 1978); S. Rep. No. 729, 95th Cong. 2d Sess. 6 (1978).

society." *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

Under no theory can plaintiff's sex in the instant case be thought to be "reasonably related" to her "ability to perform" the secretarial and other related clerical functions involved in her job. Indeed, defendant himself described her as an "extremely capable secretary," and traditionally secretarial duties have been deemed to be appropriate for women.

6. Principles Of Statutory Construction Require That Title VII And 2 U.S.C. § 92 Be Interpreted To Exclude Unconstitutional Conduct.

Although no statute need be considered in determining whether a cause of action arises directly under the Constitution, if congressional actions are deemed relevant they must be construed harmoniously and, if possible, in a way that avoids a finding of unconstitutionality.[54] The statutes pertinent to the instant case can be harmonized only by construing 2 U.S.C. § 92 and Title VII not to include conduct prohibited both by 5 U.S.C. § 7151 and the Constitution. Indeed, this approach is compelled, because

[54]Morton v. Mancari, 417 U.S. 535, 550-51 (1974); Bowman v. Texas Education Foundation, Inc., 454 F.2d 1097, 1101 (5th Cir. 1972); Northern Natural Gas Co. v. Grounds, 441 F.2d 704, 719 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971); Baines v. City of Danville, 337 F.2d 579, 590-91 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Panama Canal Co. v. Anderson, 312 F.2d 98, 100 (5th Cir. 1963); Hyrup v. Kleppe, 406 F. Supp. 214, 217 (D. Colo. 1976); Florida East Coast Ry. v. United States, 259 F. Supp. 993, 996 (M.D. Fla. 1966) (3-judge court), *aff'd*, 386 U.S. 544 (1967); United States v. Five Gambling Devices, 346 U.S. 441, 448-49 (1953); Ashwander v. TVA, 297 U.S. 288, 348 n.8 (1936), (Brandeis, J., concurring).

legislation permitting employment discrimination on the basis of race or sex by a congressman would be unconstitutional.[55] *Miranda v. Arizona*, 384 U.S. 436, 491 (1966).

[55]Subsequent and fledgling efforts by Congress to implement its anti-discrimination rules, *supra*, by providing an administrative mechanism for the consideration of discrimination complaints by congressional employees may not be considered either as indicative of congressional intent to provide a remedy or of the need for judicial inaction. Even had Senate Resolution 431 or House Resolution 1380 not failed of passage prior to the congressional recess in October 1978, they would neither have provided a remedy to plaintiff here nor have foreclosed the possibility of implication of a cause of action under the Constitution. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Indeed, the proponents of S. Res. 431 thought a judicial remedy was already available under the decision of the panel below to plaintiffs charging constitutional violations.

> "[S]ince no statute has granted jurisdiction to the courts for the enforcement of equal opportunity in Congress, judicial remedies are available only to the extent that Constitutional rights have been violated. (Under Passman v. Davis [sic], 544 F.2d 865 (5th Cir. 1977), plaintiff may assert a discrimination claim under the equal protection provision of the Due Process Clause.)" S. Rep. No. 729, 95th Cong., 2d Sess. 8 (1978).

See also 124 Cong. Rec. S18209, S18228 (daily ed. October 11, 1978).

These resolutions, like proposed amendments to 42 U.S.C. §1983, may not be deemed to express by their failure congressional intent. As discussed above, in the cases where §1983 did not apply, the courts have been prepared to imply *Bivens* causes of action for constitutional violations. The same is required here.

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY TO DEFENDANT FOR UNCONSTITUTIONAL SEX DISCRIMINATION IN THE INSTANT CASE.

A. Because Discharging A Secretary Solely And Expressly On The Basis Of Her Sex Is Not Within The "Sphere Of Legislative Activity," The Speech Or Debate Clause Affords Defendant No Legislative Immunity.

If this Court holds that plaintiff has a private cause of action for money damages arising under the Fifth Amendment, the issue whether defendant can cloak himself with absolute immunity from suit becomes one of controlling importance.[56] Having won the right to proceed, plaintiff would still be prevented from securing redress for her injuries if defendant is entitled to absolute legislative immunity.[57]

[56]In the proceedings below, both the district court and the panel of the court of appeals held that no immunity doctrine would bar this action. Although the question whether art. I, §6, the Speech or Debate Clause of the United States Constitution, protects the congressman from judicial inquiry was expressly framed for rehearing (A. 41), the en banc court of appeals did not address the issue.

[57]The only immunity doctrine that defendant can seriously seek to invoke is that of legislative immunity, founded in the Speech or Debate Clause of the Constitution. Although at various points in the proceedings below defendant has asserted that sovereign or absolute official immunity should apply, those contentions are without merit.

As to the claim of sovereign immunity, plaintiff sues defendant in his individual capacity. No relief against the United States has been requested. This action is now limited to a claim for money damages that

(continued)

The Speech or Debate Clause[58] provides a member of Congress with absolute immunity from liability for activities that fall within its ambit, and thus bars any lawsuit. It is well established that the Speech or Debate Clause has "finite limits." *Doe v. McMillan,* 412 U.S. 306, 317 (1973). On nine separate occasions this Court has determined where the boundaries of the Clause in fact lie.[59] This Court has interpreted the Clause to effectuate its intended purposes, holding that legislative immunity protects those activities "essential to legislating." *Gravel v. United States,* 408 U.S. 606, 621 (1972). The decision to discharge an office worker

(footnote continued from preceding page)

will be assessed against defendant personally. The sovereign immunity doctrine is inapplicable, since no recovery against the United States Treasury is contemplated. Land v. Dollar, 330 U.S. 731 (1947).

As to the claim of absolute official immunity, this Court has held that, in the case of federal legislators, any common law privilege against legal suit was incorporated into the Constitution as art. I, §6, Tenney v. Brandhove, 341 U.S. 367, 379 (1951), and the immunity provided is coextensive with that of the Speech or Debate Clause, Doe v. McMillan, 412 U.S. 306, 324 (1973). Even were this Court to depart from those precedents and accord defendant an immunity different from that afforded legislators by the Speech or Debate Clause, that immunity would not be absolute, but must be limited to a good faith defense at trial. Butz v. Economou, 98 S. Ct. 2894 (1978).

[58]The Clause provides in pertinent part "for any speech or debate in either house [the Senators and Representatives] shall not be questioned in any other place." U.S. Const., art. I, §6.

[59]Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

on the basis of sex is not such an action.[60] To extend the boundaries of the protection to events so removed from the legislative process would controvert both the historical mandate of the Framers and subsequent judicial interpretation of the Clause.

1. Both The History And Plain Meaning Of The Speech Or Debate Clause Compel The Conclusion That It Does Not Protect Defendant Here.

The literal core of legislative immunity is "speech or debate in either House." This Court has always been mindful of the purposes of the Framers in mandating this immunity for federal legislators and has refused to broaden its scope to a grant of personal prerogative. In interpreting the Clause, the Court has consistently stated that any protected activity must be an "integral part" of the legislative process. *Gravel v. United States, supra,* 408 U.S. at 625.

The "central role" and "fundamental purpose" of the Speech or Debate Clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 617-18. *See also Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *United States v. Brewster,* 408 U.S. 501, 507-09 (1972); *United States v. Johnson,* 383 U.S. 169, 181 (1966). Their memories of abuse of parliament by the monarchy and its judges still fresh, the Framers sought to ensure the independence of the legislative branch. In essence, the Clause is a statement of separation of powers

[60]It must be emphasized that petitioner performed only secretarial and related clerical functions. Respondent's termination letter twice refers to her role as "secretarial" and makes no suggestion that she participated in legislative or policy-making decisions. (A. 6, 7.)

rather than a grant of unfettered privilege. *See* 62-68, *infra.*

Defendant's discharge of a secretary could not be further removed from these purposes. His employment practices, as they pertain to clerical personnel, do not affect the legislative process at all. To immunize him from liability for the consequences of his clerical employment decisions would contradict the intentions of the Framers.

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster, supra,* 408 U.S. at 507.

See also Eastland v. United States Servicemen's Fund, supra, 421 U.S. at 502; *Gravel v. United States, supra,* 408 U.S. at 626.[61]

It is in that context — protection of the legislator in his legislating capacity — that the breadth of the Speech or Debate Clause has been interpreted and applied by this Court. Its "fundamental purpose" is "freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator.*" *Gravel v. United States, supra,* 408 U.S. at 618 (emphasis added). It is the legislative task, "represent[ing] the interests of their

[61]As Senator Metcalf, Chairman of the Joint Committee on Congressional Operations, acknowledged, "Legislative immunity is assumed by many to be a personal privilege or perquisite of office of individual Members of Congress, freeing them from being called to account for any indiscretion or misdeed. *Nothing could be further removed from the reality of the situation.*" "Constitutional Immunity of Members of Congress," *Hearings Before the Joint Committee on Congressional Operations,* 93d Cong., 1st Sess. 2 (1973) (emphasis added) (hereinafter "Joint Committee Hearings").

constituents without fear that they will be later called to task in the courts for that representation," *Powell v. McCormack,* 395 U.S. 486, 503 (1969), which the Clause safeguards. It is not the individual but the independent legislature which is to be protected. Defendant cannot cloak himself in immunity unless his actions pertain to "speech or debate" as so interpreted. This Court has admonished that "[w]e would not think it sound or wise . . . to extend the privilege beyond . . . [the] literal language [of the Clause] . . . ," *United States v. Brewster, supra,* 408 U.S. at 516, and that in light of the potential abuse of the Clause, its protective ambit should be no broader than that "necessary to preserve the integrity of the legislative process." *Id.* at 517.

2. Prior Case Law Affords Defendant No Protection Under The Speech Or Debate Clause.

In its efforts to construe the Speech or Debate Clause in conformity with the Framers' purposes, this Court has consistently held that only actions "in the sphere of legitimate legislative activity" are protected. *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Beyond literal speech or debate, the Clause protects activities taking place "in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880). Such activities must be "things generally said or done in the House or the Senate in the performance of official duties," *United States v. Brewster, supra,* 408 U.S. at 512, and must be an "integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the

consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States, supra,* 408 U.S. at 625.

This Court has clearly stated that an activity does not qualify for speech or debate protection merely because it is in some remote or tangential way "related" to the legislative process.

> "We would not think it sound or wise, simply out of an abundance of caution . . . to extend the privilege beyond its intended scope, its literal language, and its history, to include all things *in any way related* to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States v. Brewster, supra,* 408 U.S. at 516 (emphasis added).[62]

Neither are all activities "regularly" or "generally" done by members of Congress coterminous with legislative activity protected by the Clause. *Doe v. McMillan, supra,* 412 U.S. at 313; *Gravel v. United States, supra,* 408 U.S. at 625; *McSurely v. McClellan,* 533 F.2d 1277, 1286 n.28 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom. McAdams v. McSurely,* 98 S. Ct. 3116 (1978).

Those activities held immunized by the Clause have been either (1) part of the *actual process* of investigating,

[62]Defendant concedes that his conduct did not relate to the "*direct* discharge of legislative functions," but argues that speech or debate protection should be extended to "those activities *incidental* to the direct performance of the legislative function." Brief in Support of Petition for Rehearing En Banc at 6-7 (emphases in original). This would require this Court to overrule *Brewster's* holding that an activity is not entitled to speech or debate protection unless it is an actual part of the legislative process.

formulating, and voting on legislation, or (2) part of the *actual performance* of other business which "the Constitution places within the jurisdiction of either House."[63] *Gravel v. United States, supra,* 408 U.S. at 625. Activities held immune including voting on legislation, *Kilbourn v. Thompson, supra,* 103 U.S. at 168; speeches on the House floor, *United States v. Johnson, supra,* 383 U.S. at 176-77; congressional investigations, *Doe v. McMillan, supra,* 412 U.S. at 306; issuance of investigatory subpoenas, *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 491; subcommittee hearings, *Gravel v. United States, supra,* 408 U.S. at 606; and internal circulation of reports, *Doe v. McMillan, supra,* 412 U.S. at 312.

Speech or debate defenses have been rejected in a number of cases arguably closer to the legislative process than is the firing of an office worker. Acknowledging that members of Congress perform a myriad of activities, the courts will not extend the Clause to protect those not "essential to legislating." Activities held not to be immunized by the Clause include communication with the Department of Justice, *United States v. Johnson, supra,* 383 U.S. at 172, or the Executive Branch and administrative agencies, *Gravel v. United States, supra,* 408 U.S. at 625 and *Hutchinson v. Proxmire,* 579 F.2d 1027, 1032 (7th Cir. 1978); gathering information antecedent to a hearing, *Gravel v. United States, supra,* 408 U.S. at 628; improper dissemination of actionable information outside Congress, *Doe v. McMillan,*

[63]An example of this second category of business constitutionally placed within the jurisdiction of either House is found in Consumers Union of the United States, Inc., v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (accreditation of a periodical to the congressional press gallery held to be a legislative function). Firing an office worker obviously does not fall within this category.

supra, 412 U.S. at 316; *Gravel v. United States, supra,* 408 U.S. at 625, and *McSurely v. McClellan, supra,* 553 F.2d at 1285-86; and unconstitutional acts committed during an investigation, *United States v. Brewster, supra,* 408 U.S. at 526, *Dombrowski v. Eastland, supra,* and *McSurely v. McClellan, supra.* These cases are persuasive authority for rejecting the defense in the instant case as well.

If these activities are unprotected by the Speech or Debate Clause, the dismissal of a clerical employee cannot be immunized. The firing of plaintiff solely on the basis of gender has nothing to do with the legislative process or "speech or debate." Plaintiff's suit in no way undermines the purposes or protections of the Speech or Debate Clause. Defendant was acting not as a legislator, but as an employer.

Defendant has urged, however, that because *all* staff employees are extremely important to members of Congress, the Speech or Debate Clause should confer absolute discretion in firing any employee. Defendant has argued that this importance is highlighted by the fact that such employees have been held entitled to speech or debate immunity themselves when fulfilling a legislative function as surrogate for their employer. Brief in Support of Petition for Rehearing En Banc at 5, citing *Gravel v. United States, supra.*

Defendant's argument, however, draws no support from the case law. Previous decisions have extended such a privilege only to relatively high-level staff members in policy-making positions, such as legislative aides, *Gravel v. United States, supra,* or committee counsel, *Eastland v. United States Servicemen's Fund, supra,* where the activities of the member and the employee were not distinguishable. *Eastland v. United States Servicemen's Fund, supra,* 421 U.S. at 507. Plaintiff was a secretary. Moreover,

defendant has ignored the cases where legislative employees who participated in unconstitutional activity were held responsible for their acts, regardless of the immunity extended to the member of Congress. *Powell v. McCormack, supra; Dombrowski v. Eastland, supra; Kilbourn v. Thompson, supra.* Merely because an employee may derive from the Speech or Debate Clause immunity from suit for engaging in legislative activities at the behest of a member of Congress does not mean that the member's employment decisions may be based on an impermissible criterion such as race or sex.

The issue in this case is not whether a high-level aide engaged in legislative or policy-making activity would enjoy the legislator's immunity, but whether a congressman is protected in his decision to fire an office employee whom he has never asserted had such responsibilities. This Court need not decide the question whether defendant would be entitled to speech or debate protection if he discharged a policy-making aide for unconstitutional reasons.

In *Elrod v. Burns,* 427 U.S. 347, 367, 372 (1976), this Court ratified that distinction in prohibiting the patronage firing of nonpolicy-making officials on First and Fourteenth Amendment grounds. In determining whether non-civil service employees of county government, who alleged they were discharged or threatened with discharge solely because of their partisan political affiliation, stated a claim for deprivation of constitutional rights, this Court held that patronage dismissals "clearly infringe First Amendment interests," *id.* at 360. That encroachment is permitted only by the government's demonstration that a vitally important interest is at stake, *id.* at 362, and that the benefit to the government outweighs the loss of constitutionally protected

rights, *id.* at 363. The interest advanced in support of patronage was the need for political loyalty of employees, *id.* at 367. While acknowledging the strength of this justification, this Court refused to validate patronage entirely, but instead decided that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.*

In distinguishing policy and nonpolicy-making positions, this Court admonished that "The nature of the responsibilities is critical" and articulated several criteria for making the determination:

> "While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policy-making position. . . Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 367-68.

Here, plaintiff was in no way related to the legislative or policy aspects of defendant's office. Her work was solely clerical. Plaintiff was responsible only for general office administration. She had no advisory or planning functions, and defendant's stated reason for discharging her was not remotely related to legislative or policy considerations.

If the act of which plaintiff complains here is regarded as a "legislative" activity entitled to congressional immunity, a member of Congress will be exempt from liability for

virtually any action. Under such a broad reading, even such conduct as violating the terms of a lease on a rented office in a member's home district would be immune from suit. Such a holding would cut the Speech and Debate Clause loose from its sound mooring in things said or done in the actual legislative process.

Thus, the Court need not consider how the interests that the Speech or Debate Clause protects can be harmonized with claims that might be made by other plaintiffs in other cases. In this case — where the allegation of sex discrimination is explicit and documented, where plaintiff did not hold a policy-level position and was not an intimate advisor or representative of the congressman, and where the Rule 12(b)(6) posture of the case precludes speculation about defenses that may be raised at trial — this Court should hold that the Speech or Debate Clause does not bar this suit.

3. The Speech Or Debate Clause Should Be Construed Narrowly When Claimed As a Defense To Unconstitutional Conduct.

In interpreting the Speech or Debate Clause, this Court has stated that it takes a "decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel v. United States, supra,* 408 U.S. at 620.[64] Members of Congress are not "super-citizens,"

[64] *See also* Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); United States v. Johnson, 383 U.S. 169, 172 (1966); Tenney v. Brandhove, *supra,* 341 U.S. at 377; Kilbourn v. Thompson, 103 U.S. 168, 204 (1880); McSurely v. McClellan, 521 F.2d 1024, 1037 (D.C. Cir. 1975), *aff'd by an equally divided court,* 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom.* McAdams v. McSurely, 98 S. Ct. 3116 (1978).

United States v. Brewster, supra, 408 U.S. at 516, and "ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons," *Gravel v. United States, supra,* 408 U.S. at 615. Defendant's unconstitutional action should therefore be judged by a stricter standard than if his action were, for example, merely a common law tort.[65]

This Court has recently made this distinction in the context of determining whether executive branch official immunity for unconstitutional action should be qualified or absolute. *Butz v. Economou,* 98 S. Ct. 2894 (1978). Refusing to grant the latter under the authority of *Barr v. Matteo,* 360 U.S. 564 (1959), a defamation action against the acting director of a federal agency, this Court in *Economou* stated "that a quite different question would have been presented [in *Barr*] had the officer ignored an express statutory or constitutional limitation on his authority . . . [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness

[65] *See* Reinstein & Silverglate, *Legislative Privilege and The Separation of Powers,* 86 Harv. L. Rev. 1113, 1174-75 (1973):

> "Even assuming, however, that tort suits in general should or will continue to be precluded by the speech or debate clause, functional considerations indicate that the courts should exercise their jurisdiction and consider redress for legislative violations of individuals' *constitutional* rights . . . . Judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman. The speech or debate clause cannot be read in isolation from the entire constitutional scheme; judicial respect for and enforcement of the Bill of Rights is no less important than respect for the prerogatives of individual congressmen." (Emphasis in original.) (Footnotes omitted.)

See also Joint Committee Hearings, *supra.*

embodied in the Constitution." *Butz v. Economou, supra,* 98 S. Ct. at 2902, 2905. This Court, limiting its conclusion to the constitutional issues, accorded federal officials only a qualified immunity for alleged violations of constitutional rights by analogy to 42 U.S.C. § 1983. *Id.* at 2905. That analogy and analysis are equally appropriate here.

B. Even Though A Coordinate Branch Of Government Is Involved, This Court Should Not Decline to Enforce The Constitution.

Because our constitutional system is predicated upon three independent branches of government, courts are understandably reluctant to intervene in the affairs of a coordinate branch. Indeed, the *Bivens* court acknowledged that there might be "special factors counseling hesitation" in some instances, in implying causes of action for money damages directly from the Constitution. 403 U.S. at 396.[66] Judicial intervention in this matter is justified, however, because it is essential for the vindication of paramount constitutional principles.

1. This Court Has Sustained Individual Rights In Actions Against Congress And The Executive Branch.

This is a case of blatant unconstitutional discrimination by a member of Congress acting in his individual capacity. It is not a suit against the United States, nor is it an action challenging an act of Congress or the Executive Branch. The

[66]The only factor articulated was that of "federal fiscal policy as in United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)." There are no such special factors here.

doctrines variously invoked to prohibit judicial intervention — including "sovereign immunity," "political question," and "separation of powers" — are totally inapposite to the instant case. Those doctrines govern the relationship of the judiciary with the other *institutions* — not that of the judiciary with an *individual.* When Congress has enunciated as an institution that employment decisions made without regard to race, color, religion, sex, or national origin, 5 U.S.C. § 7151, do not interfere with any proper legislative function, there is no reason for this Court to come to an opposite conclusion or to stay its hand on a bare record.

The only basis on which the judiciary could refrain from deciding this matter would be constitutionally-created legislative immunity under the Speech or Debate Clause. *See* pp. 50-62, *supra.* That bar, however, has no bearing on the questions whether to imply a *Bivens* cause of action or whether to refrain from decision here solely because a *member* of Congress is involved.

This Court has responded to the needs of civil rights litigants, even when the cause of action has arisen against the legislative or the executive branch. In many of these cases, far more interference in the functioning of those branches was required than in the case of an employee suing an individual member of Congress for his personal, non-legislative activities.

In suits involving members of Congress, separation of powers questions have been resolved by reference to the Speech or Debate Clause — the ultimate guarantor of separation of powers.[67] *United States v. Johnson,* 383 U.S.

[67]"While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of power implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress,

(continued)

169, 178 (1966); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson,* 103 U.S. 168, 190-200 (1880). The only legislative activities which have been held to present "political questions" and therefore to be nonjusticiable are those expressly delegated to Congress, *e.g.,* adoption of constitutional amendments and the war-making power under art. I, § 8. *See, e.g., Massachusetts v. Laird,* 400 U.S. 886 (1970); *Coleman v. Miller,* 307 U.S. 433 (1939). *See also Baker v. Carr,* 369 U.S. 186 (1962); *Powell v. McCormack,* 395 U.S. 486 (1969).

The very purpose of the Speech or Debate Clause, providing legislative immunity for members of Congress from suits where it applies, was to protect the legislature "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary." *United States v. Johnson, supra,* 383 U.S. at 179. Nonetheless, when this Court has found congressional activity to exceed the bounds of the Speech or Debate Clause, it has not been hesitant to exercise its responsibility in scrutinizing the action of the coordinate branch. *Doe v. McMillan,* 412 U.S. 306, 320 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951). Individual rights have been sustained even in cases where the member himself was immune from suit by virtue of the Clause. *Doe v. McMillan, supra,* 412 U.S. at 320; *Gravel v. United States,* 408 U.S. 606, 618-20 (1972); *Tenney v. Brandhove, supra,* 341 U.S. at 377 (1951); *Kilbourn v. Thompson, supra,* 103 U.S. 168 (1880). And when the member's actions have exceeded the bounds of that Clause, this Court has not been

(footnote continued from preceding page)
see, e.g., Kilbourn v. Thompson, *supra;* Dombrowski v. Eastland, *supra,* even when the Executive Branch is also involved, *see, e.g.,* United States v. Brewster, *supra;* Gravel v. United States, *supra.*" Doe v. McMillan, 412 U.S. 306, 318 n.12 (1973).

reluctant to permit prosecution. *United States v. Brewster,* 408 U.S. 501 (1972) (Senator may be prosecuted under criminal statute for accepting bribe in exchange for legislative act). This Court's task is "to apply the Clause in such a way as to insure the independence of the legislature without altering the historical balance of the three co-equal branches of Government." *Id.* at 508. The "speech or debate privilege was designed to preserve legislative independence, not supremacy."[68] *Id.*

The courts have also refused to insulate unilateral action by an official of the Executive Branch from judicial review pursuant to the separation of powers doctrine. *See, e.g.,*

[68] *See also* Powell v. McCormack, 395 U.S. 486 (1969). In *Powell,* respondents, various members of the House of Representatives, contended that the Speech or Debate Clause and political question doctrine barred petitioner's action contesting, *inter alia,* a House Resolution denying him his seat. The House, they contended, had exclusive power to police its own membership. That argument was rejected on both grounds. Powell v. McCormack, 395 U.S. 486, 501-06, 518-48 (1969). The intrusion into the internal affairs of Congress in *Powell* was far greater than that which would occur here. Should defendant raise similar arguments, they should be rejected on *Powell's* authority.

It also should be noted that the issue of federal court jurisdiction to entertain the action was raised in Powell v. McCormack. Two years before the decision in *Bivens,* this Court held that the federal courts could entertain this action under its "arising under" jurisdiction. "[A] suit 'arises under' the Constitution if the petitioner's claim 'will be sustained if the Constitution' . . . [is] given one construction and will be defeated if [it is] given another," citing Bell v. Hood, 327 U.S. 678, 685 (1946). Powell v. McCormack, *supra,* 395 U.S. at 514. Because 28 U.S.C. §1331(a) grants federal courts "arising under" jurisdiction, the Court held the suit to be authorized by the statute. Although that plaintiff did not request money damages, his cause of action was otherwise like *Bivens,* and a prelude to that decision. Congressman Powell had no statutory cause of action. This Court granted him equitable relief.

Nixon v. Administrator of General Services, 433 U.S. 425, 441-46 (1977); *United States v. Nixon,* 418 U.S. 683 (1974); *Iowa ex rel. State Highway Commission v. Brinegar,* 512 F.2d 722 (8th Cir. 1975); *Pennsylvania v. Lynn,* 501 F.2d 848 (D.C. Cir. 1974); *National Treasury Employee's Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Louisiana ex rel. Guste v. Brinegar,* 388 F. Supp. 1319 (D.D.C. 1975).

This is a case where the courts need only perform their traditional and special function — constitutional interpretation. *Marbury v. Madison,* 1 Cranch 137 (1803). *See also Powell v. McCormack,* 395 U.S. 486, 548-9 (1969); *Baker v. Carr,* 369 U.S. 186, 211 (1962). Particularly where no interference with the internal affairs of Congress is required, this Court should not abstain. Since defendant himself is not personally immune by virtue of the Constitution, there is no bar to trial.

2. Defendant's Action Is *Ultra Vires* And Not Entitled To Judicial Self-Restraint.

The unconstitutional action of defendant in the instant case is clearly an *ultra vires* activity. Surely a congressman sworn to protect and defend the Constitution, 5 U.S.C. § 3331, is not permitted to cloak unconstitutional activity with the mantle of his office. The courts have held that actions usually nonjusticiable are nonetheless appropriate for judicial resolution when "clear abuse" or "arbitrary or discriminatory" use of discretion, or actions outside the scope of the official's authorized power, are at issue. This is

especially true for suits alleging personal injury and requesting money damages.[69]

In the first case interpreting the Speech or Debate Clause, this Court expressly reserved the question, but implied that *ultra vires* activity would be entitled to no protection:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an *extraordinary character,* for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, *we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." Kilbourn v. Thompson, supra,* 103 U.S. at 204-205. (Emphasis added.)

Later speech or debate decisions have implicitly adopted this conclusion. *Tenney v. Brandhove, supra,* 341 U.S. at 378-9; *United States v. Brewster, supra,* 408 U.S. at 510. Although suits against members of Congress have not traditionally been subject to this kind of "excessive authority" analysis — precisely because the nature of the implicated activity was nonlegislative — *ultra vires* activities can

[69]See Gilligan v. Morgan, 413 U.S. 1 (1973); Haines v. Kerner, 404 U.S. 519, *reh. denied,* 405 U.S. 948 (1972) (suits will be entertained against the executive branch in egregious circumstances); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); Dugan v. Rank, 372 U.S. 609 (1963) (suits against federal officers for *ultra vires* activities are not suits against the sovereign because the challenged activity exceeds the scope of the official's authorized power).

be entitled to no protection regardless of their relationship to legitimate legislative activity.[70] Unconstitutional activity by a congressman is clearly impermissible. Defendant's action constitutes conduct which, under the principles articulated above, may and should be subject to judicial review by a federal court.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals en banc should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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[70] *See also* McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom.* McAdams v. McSurely, 98 S.Ct. 3116 (1978); Gravel v. United States, *supra*, 408 U.S. at 621; United States v. Brewster, *supra*, 408 U.S. at 526, suggesting that speech or debate immunity dissolves when unlawful means are used to implement legitimate legislative objectives. "The employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating.' " McSurely v. McClellan, *supra*, 553 F.2d at 1288.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, reported at 571 F.2d 793, appears at Appendix 44-95. The opinion of the panel of the Court of Appeals, reported at 544 F.2d 865, appears at Appendix 11-40. The opinion of the United States District Court for the Western District of Louisiana, which is not reported, appears at Appendix 9-10.

JURISDICTION

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed a judgment of the district court on January 3, 1977. Timely petitions for rehearing and rehearing en banc were granted by order dated May 17, 1977, which appears at Appendix 43. The judgment of the court of appeals on rehearing en banc was entered April 18, 1978, and appears at Appendix 96-97. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a cause of action for money damages based upon a claim of employment discrimination against members of Congress may be implied directly from the Fifth Amendment to the United States Constitution under the rationale of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

2. Whether the Speech or Debate Clause of the United States Constitution bars an action for money damages against a federal congressman predicated upon a claim of sex discrimination in the discharge of a personal staff member.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Article 1, §6 of the Constitution of the United States provides in pertinent part:

> ". . . for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Section 7151 of Title 5 of the United States Code provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin."

Section 717 of Title VII of the Civil Rights Act of 1964, Section 2000e-16(a) of Title 42 of the United States Code, provides in pertinent part:

> "All personnel actions affecting employees . . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service . . . shall be free from any discrimination based on race, color, religion, sex, or national origin."

Section 92 of Title 2 of the United States Code provides in pertinent part:

> ". . . such persons shall be subject to removal at anytime by such member (of the House of Representatives) . . . with or without cause."

STATEMENT OF THE CASE

Plaintiff Shirley Davis was employed by defendant Otto E. Passman, United States Congressman from the Fifth Congressional District of Louisiana, as his Deputy Administrative Assistant from February 1, 1974 through July 31, 1974. During her tenure, plaintiff considered herself to

be the understudy to Congressman Passman's administrative assistant and expected a promotion to that position upon the imminent retirement of the administrative assistant. Appendix 4. Congressman Passman terminated the employment of Mrs. Davis stating in his June 21, 1974 letter of dismissal:

> "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." Appendix 6.[1]

Plaintiff filed this action in the United States District Court for the Western District of Louisiana on August 7, 1974, alleging that defendant's conduct constituted sex discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff requested money damages, including back pay, as well as various forms of specific relief that are not involved in this case because Congressman Passman is no longer in office, his tenure ending January 3, 1977.

Defendant moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending (1) the discharge of plaintiff did not violate the Fifth Amendment; (2) plaintiff has no private right of action; and (3) the suit is barred by the doctrines of sovereign and official immunity. On February 26, 1975, the district court granted the motion, ruling in defendant's favor on the first two issues, but also holding that the immunity doctrines would not bar plaintiff's suit. (Appendix 9-10)

[1]Congressman Passman is prepared to demonstrate at trial that the discharge was for nondiscriminatory reasons, if such need arises.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, reversed and remanded. 544 F.2d 865 (Appendix 11-40). The majority held (1) dismissal of staff by a member of Congress on the basis of sex violates the equal protection component of the Fifth Amendment Due Process Clause (Appendix 13-19); (2) plaintiff has a private right of action for damages arising directly under the Fifth Amendment (Appendix 21-29); (3) sovereign immunity is no bar to a damage award against a congressman as an individual (Appendix 29-31); (4) legislative immunity, granted by the Speech or Debate Clause of the United States Constitution, Art. I, §6, does not extend to staff dismissals since that conduct is not within the "sphere of legitimate legislative activity" (Appendix 31-38); and (5) a congressman enjoys no absolute immunity outside that afforded by the Speech or Debate Clause (Appendix 38-40). The dissenting judge, Jones, concluded that the doctrine of separation of powers required affirmance of the district court's action (Appendix 40).

After rehearing the case en banc, the Court of Appeals reversed the panel in a 12-2 decision, and affirmed in part and vacated in part the judgment of the District Court. 571 F.2d 793 (Appendix 96-97). Considering only the issue of whether plaintiff had an implied cause of action for money damages arising directly under the Fifth Amendment, the majority held that the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) should not be extended to apply a money damages remedy from the Fifth Amendment against members of Congress. And in so holding the Court applied the factors set forth in *Cort v. Ash*, 422 U.S. 66, 77-85 (1975) to determine whether to imply the damage action and

also determined whether the Constitution itself compelled an action for money damages implied from the Fifth Amendment due process clause. (Appendix 55). In a concurring opinion, Judge Jones again related that considerations of separation of powers and Speech or Debate Clause immunity should apply. Judge Roney also concurred separately and asserted that the extension of the *Bivens* rationale depended on the nature of the personal right involved and that Constitutional causes of action should be predicated upon preconstitutional notions of tort law (Appendix 59-66).

Judge Goldberg and Chief Judge Brown dissented and urged that the Constitution mandated that *some* remedy be available to vindicate constitutional rights. Judge Goldberg disagreed with the majority's application of the *Cort* criteria and felt that those criteria would imply a cause of action for money damages in this case. (Appendix 83).

SUMMARY OF ARGUMENT

Plaintiff seeks under *Bivens* rationale to imply a cause of action for money damages against a former Congressman for alleged sex discrimination in her discharge from his personal staff. A *Bivens* cause of action for damages by federal officials or employees should not be extended beyond its Fourth Amendment factual context involving physical intrusions in search and seizure and arrest situations or beyond factual contexts involving preconstitutional notions of tort law. "Special factors counselling hesitation" in the expansion of the *Bivens* rationale exist in this case. To expand the *Bivens* rationale to encompass possible Fifth Amendment due process infringements will create an unmanageable flood of new cases and will discourage vigorous federal action. Congress' intent is that employees on the personal staff of members of Congress who are excluded from coverage of the Civil Rights Act of 1964 have no judicial remedy. The doctrine of separation of powers requires that the judiciary refrain from scrutinizing Congressional personnel actions as does the Speech or Debate Clause of the Constitution. The foregoing special factors militate against expansion of the *Bivens* rationale to provide a cause of action for money damages to personal staff employees of members of Congress for alleged employment discrimination.

An absolute bar to this action is the Speech or Debate Clause of the Constitution which provides immunity to members of Congress from scrutiny by the judiciary of the members' legislative activities. The functions of the staff of a member of Congress are such an integral part of, and necessary to, the member's performance of the legislative function that the discharge of personal staff members must be considered to be within the sphere of legitimate legislative activity. Personal staff employees are so involved in the legislative function that they have been found to share the Speech or Debate immunity of members of Congress. Under the application of the Speech or Debate immunity, Congressman Passman's motives are not subject to question and any right of action based upon the discharge of a member of his legislative staff is completely barred.

I.

A CAUSE OF ACTION FOR MONEY DAMAGES BASED UPON A CLAIM OF EMPLOYMENT DISCRIMINATION AGAINST MEMBERS OF CONGRESS SHOULD NOT BE IMPLIED DIRECTLY FROM THE FIFTH AMENDMENT UNDER THE RATIONALE OF *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*, 403 U.S. 388 (1971).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,*[2] this Court held that a violation by federal narcotics agents of an individual's Fourth Amendment right ". . . to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. . ." gave rise to a cause of action for damages. The Court noted that ". . . the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation" and stated further that "it is settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done". Id. at 396, quoting *Bell v. Hood,* 327 U.S. 678, at 684, 90 L.Ed. 939, at 944.

Importantly, the Court then related that "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, supra* at 396. In response to the government's position that the question involved was whether money damages were neces-

[2]403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971).

sary to enforce the Fourth Amendment, the Court stated "For we have no explicit Congressional declaration that persons injured by a federal official's violation of the Fourth Amendment may not recover money damages from the agents but must instead be remitted to another remedy, equally effective in view of Congress." *Bivens, supra,* at 397. In his concurring opinion, Justice Harlan noted that ". . . the appropriateness of money damages may well vary with the nature of the personal interest asserted." *Bivens,* supra at 409, n.9 Chief Justice Burger, Justice Black, and Justice Blackmun dissented. Chief Justice Burger dissented on the basis that the doctrine of separation of powers required that a judicial remedy should not be created where not enacted by Congress nor provided for by the Constitution. *Bivens, supra* at 411, 412. Justice Black based his dissent upon the fact that as Congress had created no damage remedy for improper Fourth Amendment intrusions by federal officials, it was beyond the power of the Court to create a remedy. Justice Blackmun dissented on the basis of the majority opinion in the Court below[3] and on the bases that ". . . the judicial legislation, which the Court in its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases," and that proper law enforcement would be stultified by the threat of suit.

Quite obviously, *Bivens* did not involve a former member of Congress, a discharged deputy administrative assistant, any allegation of sex discrimination[4] or an appeal to the Fifth Amendment to the Constitution. Unlike *Bivens,* the instant

[3]That opinion is based partially upon the view that "We do not believe it is appropriate for this Court to fill the hiatus left in this area by Congress." *Bivens,* 409 F.2d 718 at 725 (1969).

[4]Defendant does not contend herein that discrimination based upon a classification of sex is not protected by the Fifth Amendment.

case involves all of these unique factors and it is submitted that the decision below was correct in its refusal to imply a *Bivens* cause of action for money damages under the Fifth Amendment for alleged sex discrimination in employment by a former Congressman.

A. A Bivens Cause of Action Should Be Limited To Physical Intrusions By Federal Officers or Employees.

The *Bivens* Court noted that "an agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm than an individual trespassor exercising no authority other than his own." *Bivens, supra,* at 392. And clearly, the exercise of the police powers of the state against individual citizens gives rise to physical damages to one's person and property and to the risk of incarceration all in the name of government. And further, the eminent domain power of government may entail the physical taking of an individual's property in the name of government.[5] These are potentially physical harms which may result from the abuse of government power and the resulting harm will be even greater because they occur under color of law. A *Bivens* cause of action clearly is a useful means of providing a check upon such abuses unique to the functions of government.

However, an individual act of alleged employment discrimination by a government official and particularly

[5]*Jacobsen v. Tahoe Regional Planning Agency,* 558 F.2d 928 (9th Cir. 1977), cert. granted sub nom; *Lake County Estate, Inc. v. Tahoe Regional Planning Agency,* ___ U.S. ___, 98 S.Ct. 2843, 56 L.Ed.2d 784 (1978).

members of Congress cannot be characterized as an act which may "possess a far greater capacity for harm" than a similar act by a private citizen. Individuals are hired and fired every day and the impact is the same regardless of whether the employer was governmental or private. There is nothing inherent in government which makes an employment decision by a government official to discharge an individual have any greater effect on the discharge merely because the employer was the government.[6] To the extent that the capacity of an act for greater harm because it was a governmental act and because it was an exercise of police powers was a factor in the *Bivens* decision, that factor does not exist in an alleged discrimination case.

It is thus urged that a *Bivens* cause of action be limited to a factual situation similar to that found in *Bivens* itself where the wrong is clearly a physical intrusion and the capacity for harm is amplified because the act was a government act.

[6]Had petitioner been employed outside the federal government in the private sector there is a substantial probability that she would have had no remedy for a discharge alleged to have been motivated by sex discrimination. Section 701(b), Title VII of the Civil Rights Act of 1964, as amended, defines as "employer" in the private sector as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . ." 42 U.S.C. §2000e(b). Thus, a substantial number of small employers have no obligation whatsoever under Title VII not to discriminate on the basis of sex against their employees. Further, because the Civil Rights Act of 1866, 42 U.S.C. §1981, does not prohibit sex discrimination, as stated in *Runyon v. McCrary,* 427 U.S. 160 at 167, 49 L.Ed. 415, 96 S. Ct. 2586 (1976), an individual who has been the victim of sex discrimination in employment in the private sector has no legal relief for such discrimination unless the employer involved is large enough to be covered by the obligations of Title VII.

B. A Bivens Cause of Action Should Be Limited to "Preconstitutional Notions of Tort Law".

This is the reasoning advanced by Judge Roney in his concurring opinion in the decision below and is an alternative approach toward a proper limitation upon a *Bivens* cause of action. Appendix 59-66. It is clear that employment discrimination on the basis of sex or any other basis was not in the minds of those who drafted the Bill of Rights. In *Adair v. United States,* 208 U.S. 161, 20 S. Ct. 277, 52 L.Ed. 436 (1907) the Court stated:

> "So the right of the employee to quit the service of the employer, for whatever reason is the same as the right of the employer for whatever reason, to dispense with the services of such employee" Id. at 174, 175.

As Judge Roney noted, this was the state of the law into this century and was the law at the time of the drafting of the Constitution. The Petitioner herein thus had a right at the time of the drafting of the Constitution to be protected against unreasonable searches and seizures, but had no right at all to be free of discrimination in employment. The concept of sex discrimination in employment as a remediable wrong first became national law with passage of the Civil Rights Act of 1964, long after the drafting of the Constitution in 1787.

The limitation of a *Bivens* cause of action to preconstitutional torts which were clearly embodied in the Constitution by the framers is a much more feasible approach than subjecting federal officers to damage actions for every conceivable wrong that arises out of the Fifth Amendment's constantly expanding due process conceptions.

C. Bivens Recognized That Special Factors Counselling Hesitation May Exist.

In *Bivens,* the Court considered whether special factors existed which warranted hesitation in the creation of an action for money damages based upon the Fourth Amendment. The present case involves a multitude of special factors not present in *Bivens* which warrant the refusal to imply a cause of action for money damages based upon the Fifth Amendment.[7]

1. Expansion of a Bivens Cause of Action Beyond Physical Intrusions or Preconstitutional Torts to Include the Fifth Amendment Will Create An Unmanageable Flood of New Cases.

Bivens was based upon a rather limited fact situation involving the abuse of federal police powers in a search and

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[7]Whether the implication of a damage action is considered from the standpoint of the criteria set forth in *Cort v. Ash,* 422 U.S. 466, (45 L.Ed.2d 26, 95 S. Ct. 2080) (1975) or from the "special factors" approach of *Bivens,* the relevant criteria were properly evaluated in the en banc decision below and that decision should be affirmed. The Fifth Circuit's *Cort* analysis is sound and is well expressed in the opinion below; the argument which follows herein is presented to emphasize the correctness of that decision. The Fifth Circuit recognized that *Cort* factors are not applied the same way in *Bivens* actions (Appendix 50) and this is particularly true when a coordinate branch of government is involved.". . . the use of the Constitution as the source of a plaintiff's right (in *Bivens*) was only a minute departure from the traditional and more usual use of federal legislation as the source of a plaintiff's right. The Court in *Bivens,* and other federal courts subsequently relying in *Bivens,* recognize constitutional torts in the same way and apply the same criteria that the federal courts have used for decades in recognizing torts from federal legislation." Note, *Remedies for Constitutional Torts: "Special Factors Counselling Hesitation,"* 9 Ind. L.Rev. 441, 444 (1976) (footnotes omitted).

seizure and arrest context in contravention of Fourth Amendment guarantees. Even without a definitive statement by this Court concerning the expansion of the *Bivens* rationale beyond the Fourth Amendment, every court of appeals has addressed the expansion question in the intervening six and one half years since *Bivens* was decided on June 21, 1971.[8] It would thus appear that the gates below have been opened and that unless this Court closes them, the flood will begin. The en banc decision below stated that:

> "Adoption of Davis' interpretation of *Bivens* would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law because, by its nature, every tort deprives the victim of due process through unlawful appropriation of liberty or property or both. Indeed, logically, the expansive effect of such a holding would not end there. It also would extend federal jurisdiction to cover all state action tort claims, either under pendent jurisdiction *c.f. Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372, 39 L.Ed.2d 577 (1974), or under a cause of action implied from the fourteenth amendment. The latter of these state action claims would be cognizable without regard to diversity of citizenship, amount in controversy or other present statutory limitations. Because of the breadth of due process, a decision implying and action for money damages from the fifth amendment Due Process Clause alone would extend an action

[8]See the numerous cases listed at Appendix 46, 47, 70, 71; Petitioner's Brief 20-24; and in Lehmann, *"Bivens and Its Progeny"*, 4 Hastings Const. L. Q. 531, 566-568 nn. 226-229 (1977), including district court cases. Only the Fifth Circuit has considered possible application of *Bivens* to the employment practices of Congress in the case presently before this Court.

> for damages to any constitutional guarantee. Thus, the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings looms far more ominously than in *Bivens*. 403 U.S. at 391 & n.4, 91 S. Ct. at 2002 & n.4, 29 L.Ed.2d at 623 & n.4."

It is quite significant that from 1961 to 1977 civil rights statute cases brought in the federal court system have multiplied from a paltry 296 to an incredible 13,113. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts, Table 11, 1976 id. Table 17. At the time of this writing the 1978 Annual Report is not available but surely the figures will increase even further.

If causes of action can be implied under *Bivens* directly from the Fifth Amendment, virtually any act of every federal official or employee which may be conceivably adverse to any individual's sphere of interests will support a cause of action for money damages. If the number of cases brought under civil rights statutes already justifiably has become a proper matter of judicial concern,[9] the potentially unmanageable filings based upon alleged infringement of raw Fifth Amendment rights in our increasingly litigious society should be a substantial factor counselling hesitation in this case.

[9]See *Butz v. Economou*, ___ U.S. ___, 57 L.Ed. 895, at 929, 98 S. Ct. 2894.

2. Expansion of a Bivens Cause of Action to Include Alleged Fifth Amendment Infringements by Federal Officials or Employees Will Inhibit Federal Actions and Discourage Federal Employment.

The Fifth Amendment is so broad in its scope that virtually any federal employee or federal official's actions or decisions can be challenged in a suit for damages. The threat of frequent, harassing litigation and personal liability in damages for federal actions that can be easily couched in terms of a denial of due process will lessen vigorous administration of the policies and programs of the federal government by federal officers and employees. The time and expense of defending against a myriad number and species of constitutional claims possibly resulting in a personal judgment will certainly discourage federal action[10] and could even discourage federal employment. A member of Congress would become an employer and one can only hope that the members' personal finances are sufficiently adequate to withstand money judgments without risk of bankruptcy. The

[10]See separate opinion of Justice Rehnquist in *Butz v. Economou, supra,* 57 L.Ed.2d at 926, where it was stated concerning immunity of federal officials: "But if we allow a mere allegation of unconstitutionality, obviously unproven at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The case with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his action on the merits."

placing of members of Congress in fear of large money judgments will inhibit the legislative function and will deprive the members' constituents of full and vigorous representation of their interests. If the member of Congress is financially broken by a money judgment, the member's constituents no doubt will lose the benefit of representation by the member they elected. It is submitted that the public interest can only suffer if such a condition were permitted to prevail. These considerations, too, are special factors counselling hesitation in the extension of the availability of a *Bivens* cause of action to the Fifth Amendment.

3. Congress Has Evinced Its Intent by Failing to Provide a Damages Remedy for Those in Petitioner's Position in the Noncompetitive Federal Service.

It was not until 1972 that fedeal employees in the competitive service were given a statutory right to sue for backpay under Title VII of the Civil Rights Act of 1964. In that year, Congress provided procedures in Title VII for resolution of claims of discrimination in employment of competitive federal service employees. Section 717, 42 U.S.C.A. §2000e - 16 (a) (1972). The new remedies in Section 717(a) extended to employees ". . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service. . ." Congress thus completely exempted employees such as Petitioner who were on the personal staff of Congressional representatives because those employees are not in the competitive service. They occupy a special status. The Court below noted that when Congress passed Section 717 it

believed no other effective remedy existed for federal employees:

> "Despite the series of executive and administrative directives on equal opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court relief is available to the aggrieved Federal employee. *Monetary restitution or backpay is not attainable.*" H.R. Rep. No. 92-238, 92nd Cong. 2d Sess. (1972). U.S. Code Cong. & Admin. News (1972), pp. 2137, 2160 (Emphasis supplied)

In H.R. 92-238 it was earlier noted that ". . . Congress itself has specifically provided that it is the policy of the United States to insure equal employment opportunity for Federal employees without discrimination because of race, color, religion, sex or national origin. . ." 5 U.S.C. §7151 (Supp. II 1965, 1966); U.S. Code & Admin. News, *supra*, p. 2157. So even with the statutory policy of 5 U.S.C. §7151 at p. 2157 noted, H.R. 92-238 later at p. 2160 reflects the understanding of Congress that even with the statutory policy on the books, no "monetary restitution or backpay" was available to Federal employees absent passage of Section 717 of Title VII.

Clearly, Congress had to understand that those Federal employees in the legislative and judicial branches who were exempted from the operation of Section 717 continued to have "no monetary restitution or back pay" available to them and thus, by their exclusion, intended that they should continue to have no "monetary restitution or back pay" available.[11] Indeed, in *Brown v. General Services*

[11]The implication of a damages remedy in this case would confer upon Congressional employees excluded from the Civil Rights Act of 1964 the right to recover from individual members of Congress, a right unavailable *(continued)*

Administration, 425 U.S. 820, 828, 48 L.Ed. 402, 409, 96 S. Ct. 1967 (1976) the Court stated "The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that the conclusion was entirely reasonable." Clearly, Congress intended that exempt non-competitive federal service employees in Congress such as Petitioner should continue to have no judicial remedy.

In its intention to leave legislative employees in the noncompetitive service without judicially imposed monetary relief or backpay, Congress was certainly cognizant of 2 U.S.C. §92 which provides that members of a congressional representative's staff are removable "at any time. . . with or without cause" and which is the only statutory pronouncement concerning congressional obligations in discharge cases.

The House of Representatives did not speak as a body about its members and employment discrimination until January 14, 1975, around 6 months after the July 31, 1974, termination of Petitioner Davis and subsequent to the filing of this lawsuit. When the House did speak, it did not pass a statute conferring jurisdiction upon the federal courts for its employment discrimination problems; rather, it passed an internal rule, clause 9 of Rule XLIII of the Rules of the House of Representatives[12] which states:

(footnote continued from preceding page)

to federal employees covered by the Civil Rights Act. Congress cannot have intended that its own members suffer individual liabilities for alleged employment discrimination when it excluded the members' staffs from coverage of Title VII; it intended they should have *no* liability.

[12]94th Congress Second Session, House Document 94-663; Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States at 674.

> "9. A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[13]

Surely, if the House had intended to provide a judicial remedy for its exempt employees it could have easily done so; it has provided none. And, indeed, an attempt to implement Clause 9 of Rule XLIII by establishing a House Fair Employment Relations Board, H. Res. 1380,[14] also took the form of a resolution and provided solely for internal and nonjudicial proceedings to resolve any employment discrimination problems.

It is submitted that the understanding and intent of Congress is that employees on legislative staffs are without a judicial remedy for claims of employment discrimination and that those employees shall remain without a remedy until Congress itself or each house separately, provides for a remedy. Congressional intent is relevant and should be considered in determining whether to provide a damages remedy for an alleged infringement of a Fifth Amendment right in this case because the Court would impose such a remedy on a coordinate branch of government and separation of powers considerations and Speech or Debate Clause

[13]The Senate has adopted a similar internal rule which adds age and state of physical handicap as protected characteristics.

[14]This resolution and the Senate's counterpart S. Res. 431 failed to pass before Congress adjourned in October, 1978. See Responses in Opposition to Petition for a Writ of Certiorari and the Replies of Petitioner.

guarantees are involved.[15] In this case, Congressional intent counsels hesitation in the expansion of *Bivens.*

4. The Doctrine of Separation of Powers Requires That the Judiciary Refrain From Creating a Right of Action for Damages in Staff Employees of Congressional Representatives.

Even without the existence of the Speech or Debate Clause, substantial considerations of the doctrine of separation of powers exist in this case. A Fifth Amendment suit for damages against members of Congress for employment discrimination will necessitate judicial involvement in the internal personnel processes a members of the legislative branch of government. Scrutiny of Congressional personnel actions will involve ". . . policy determinations of a kind clearly for nonjudicial discretion;" *Baker v. Carr,* 369 U.S. 186 at 217 (1962).[16] Equitable or damage remedies imposed on Congressional representataives by the judiciary would be an unwarranted interference in the legislative process and in the internal functions of a coordinate branch of gov-

[15]The Court in *Bivens* noted "For we have no . . . congressional declaration that persons injured . . . may not recover money damages from the agents," 403 U.S. at 397. Congressional intent is to be considered and the court below was correct in doing so in this case.

[16]While the judiciary has had considerable experience in employment discrimination suits, it is submitted that the issues attendant to employment discrimination suits against members would largely deal with the involved employee's unsatisfactory performance of duties related to the member's legislative functions. It would seem that the legislators are better equipped to make judgments about proper performance of legislative staff members because they obviously possess expertise and a special understanding of the legislative role.

ernment.[17] Frivilous or unsubstantiated lawsuits could be used to discredit Congressional representatives by political opponents at election time.[18] Federal judges would be faced with the task of examining the internal workings of the staffs which Congressmen and Congresswomen have assembled and with examining the motives of the legislators behind the full range of possible personnel actions. Judicial creation of remedies for noncompetitive legislative employees in their employment situations will set the stage for "across the board" class action suits alleging employment discrimination by congressional representatives or by Congress as a whole. It is conceivable that federal judges would dictate to federal legislators which individuals to hire, which individuals to reinstate after an alleged wrongful discharge, and which individuals should be promoted or receive wage increases.

It boils down to the fact that if the judiciary creates an employment discrimination cause of action in exempted noncompetitive service Congressional employees, the judiciary soon will be dictating to Congressmen and Congresswomen how their legislative responsibilities should be performed in the sense that it will dictate by whom they should be performed.

It is submitted that creation of a cause of action in this case would lead to judicial interference in the internal workings of

[17]Senator John Glenn, a sponsor of S. Res. 431, stated his understanding that for a body outside the Senate to make final decisions with respect to discrimination by the Senate would be a violation of the separation of powers doctrine of the Constitution. 134 Cong. Rec. S. 18228 (daily ed. October 12, 1978).

[18]This aspect has been of concern to members of Congress. See remarks of Senator Glenn in the Congressional Record S. 18228 (daily ed. October 11, 1978).

a coordinate branch of government such as to amount to "... a lack of respect due coordinate branches of government..." *Baker v. Carr, supra,* at 257. The creation of remedies for a legislator's alleged personnel deficiencies is an internal legislative matter which should be decided by Congress. See concurring opinion of Judge Jones in the decision below,[19] Appendix 57-60. Separation of powers concepts comprise clearly a special factor warranting hesitation in the extension of *Bivens* to a Fifth Amendment action against a member of Congress, as against other federal officers or employees.

5. Congressional Staff Members Play Such An Important Role in the Legislative Function That the Speech or Debate Clause of the Constitution Confers Immunity for a Congressional Representative's Personnel Actions.

The existence of the Speech or Debate Clause[20] itself is a special factor in this case warranting hesitation in the expansion of *Bivens.* Treated more fully, *infra,* it can operate as an absolute bar to this action and certainly must be considered as a special factor unique to this case. The work of the employees on the personal staffs of members of Congress is such an integral part of the legislative function that the members' decision to hire or fire one of those legislative staff members is itself a legislative act which,

[19]The general grant of legislative powers found in Article 1, Section 1 of the Constitution is also relied upon to further demonstrate the importance of the separation of powers doctrine in this case.

[20]Article 1, Section 6 of the Constitution, where it is written that "for any Speech or Debate in Either house, (the Senators and Representatives) shall not be questioned in any other place."

under the Speech or Debate Clause, is immune from judicial review.

In *Gravel v. United States,* 408 U.S. 606, at 617 (1972) the Court realized that "... the day-to-day work of such aides is so critical to the members' performance that they must be treated as the latters' alter ego". It is clear that the legislative function itself is immune under the Speech or Debate Clause and it is submitted that the personnel decisions of members of Congress with respect to their personal legislative staffs are immune as legislative functions.

Thus, the Constitutional considerations involving the Fifth Amendment rights of plaintiff Davis are outweighed by the weightier constitutional considerations required by the Speech or Debate Clause which emanates from the cornerstones of our system of government as contemplated by the framers of the Constitution. The existence of the Speech or Debate Clause and its application to this case warrant hesitation in the expansion of a *Bivens* cause of action to alleged Fifth Amendment infringements by members of Congress.

D. No Damages Remedy Should Be Implied From the Fifth Amendment in This Case.

It is contended generally for the reasons stated herein that an expansion of the *Bivens* rationale to imply actions for money damages directly from the Fifth Amendment is an improper and unwarranted extension of that rationale. It is further contended that even if this Court were disposed to favor expansion of the *Bivens* rationale beyond the Fourth Amendment confines of the *Bivens* decision to cover actions based on the Fifth Amendment, such an expansion would be

improper in the case at bar on its narrow facts which involves the internal employment relationship of the legislative staffs of members of Congress. The Fifth Circuit by its decision refused to supervise the internal personnel problems of Congress, if any there be, and it is urged that the en banc decision below be affirmed and that the *Bivens* rationale thereby not be extended to the particular facts of this case for the reasons set forth herein and for the reasons set forth in the en banc decision below.

II.

THE SPEECH OR DEBATE CLAUSE PROVIDES MEMBERS OF CONGRESS WITH ABSOLUTE IMMUNITY FROM JUDICIAL INQUIRY INTO THE HIRING AND FIRING OF PERSONAL STAFF EMPLOYEES.

A. The Speech or Debate Clause Has Preconstitutional Origins in the Political History of England and America.

The Speech or Debate Clause found in Article 1, Section 6 of the Constitution states that "for any speech or debate in either House, (the Senators and Representatives shall not be questioned in any other place." Justice Felix Frankfurter summarized the history of the Speech or Debate Clause as follows:

> "The privileges of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the its statement of the privilege grew stronger.... In 1689,

the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' (Citation omitted).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article 5 of the Articles of Confederation is quite close to the English Bill of rights: 'Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. . . .'" *Tenney v. Brandhove*, 341 U.S. 367, 372; 95 L.Ed. 1019, 1025 (1957).

The Speech or Debate Clause obviously had its origins in the very essence of the political process of both England and America and antedates, historically, both the Fifth Amendment and the concept of sex discrimination as an infringement of the Fifth Amendment. The Clause represents a centuries old constitutional commitment to the freedom of the individual legislators from intervention forays by the executive branch or the judicial branch of government.

B. The Speech or Debate Clause Applies to the Actions of Individuals Against Members of Congress.

The Speech or Debate Clause has been held to immunize Congressmen from persecutory forays by the Executive

Branch using judicial means[21] and has been further held to create immunity from individuals using judicial means to vindicate individual rights.[22] Thus, it is clear that when the Speech or Debate Clause applies, it "... provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, at 503 (1975). Even before the above enunciation of this principle in *Eastland*, the decisions of this Court were recognized to "... indicate that the scope of the clause is effectively coextensive in executive motivated and private action cases."[23] The case before this Court involves an attempt to assert an alleged individual right by Plaintiff Davis, and it is submitted that Davis' conception of an individual right must fall to the important immunity afforded by the Speech or Debate Clause to all Congressmen.

C. The "Sphere of Legislative Activity" is Broad and Encompasses the Personnel Actions of Members of Congress.

In *Tenney v. Brandhove*, 341 U.S. at 376, the Court directed its inquiry as to whether it appeared that the legislators ". . . were acting in the sphere of legitimate legislative activity." This, necessarily, is the same inquiry which must be made in the instant case. The mission of

[21]See for example, *Gravel v. United States*, 408 U.S. 606 (1972).

[22]*Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove, supra; Dombrowski v. Eastland*, 387 U.S. 82 (1967).

[23]Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, at 1172 (1973).

members of Congress is legislative and their primary concern is legislation. The act or acts of legislating include participating in committee investigations with issuance of compulsory process, voting on matters before Congress, speechmaking on the floor of Congress, and the circulation of information to other members of Congress, all of which legislative acts have been established as such by decisions of the Supreme Court and were noted by the panel of this Court in the original Panel decision below.[24] What must be understood is that a Congressman gathers his staff around him to assist him in performing his legislative functions; this is his ultimate and primary role, his staff's ultimate and primary role and in fact, is their whole *raison d'etre.* This reality must be properly weighed before supplanting the legislative judgment in personnel matters by legislators. It is the legislators, not the judiciary, who are charged by the Constitution with the responsibility of trying to effectively legislate, with the staff of their choice.

To amplify the pervasiveness of the legislative function, one must consider the fact that the function obviously includes inter alia the persuasion of other members of Congress to gain or disaffect support for bills, the drafting and typing of legislative proposals, the drafting and typing of letters to other Congressmen pertaining to legislative proposals, discussions with one's staff as to the views of one's constituents on pending legislation, the preparation and typing of memoranda by staff members for a Congressman's aid in considering legislation, conferences with lobbyists or special interest groups related to legislative proposals or policies, discussion among aides of different Congressmen as to legislative proposals or policies, staff

[24]Appendix 32.

scheduling of Congressmen's meetings with other Congressmen for legislative discussions, and many other doubtless daily activities in which the legislative functions of a Congressman and his staff meld and in which all participate in some facet or at some level of the legislative function depending on an individual's particular work assignment or title. The foregoing recitation of obviously typical functions of a legislator's office serves to demonstrate to the Court that the "sphere of legitimate legislative activity" cannot be narrowly compartmentalized. If the delivery of a speech on the floor of Congress is a legitimate legislative function,[25] then the Congressman or aide's preparation of the speech, including dictation to a secretary and typing, and the discussions with his staff about the form or substance of the speech are also legitimate legislative functions. Such staff functions and relationships are clearly "an integral part of

[25]See *United States v. Johnson*, 383 U.S. 169 (1966). This case is further enlightening because it demonstrates the clearly legislative nature of the work of administrative assistants. *Ibid*, at 174. There, all of the Congressman's speechwriting was performed by his administrative assistant who additionally met with special interest groups. This is the position for which Mrs. Davis was "understudy," *Davis v. Passman*, 544 F.2d, at 868, and is clearly a legislative role which required training in the legislative process to adequately fill. Indeed, Mrs. Davis, in the complaint (Appendix 4), asserts that she was well-qualified for the position of administrative assistant and even has urged the expectancy of promotion to that position as a matter requiring relief especially inasmuch as a salary increase of the difference between her already substantial pay of $18,000 per annum and the $32,000 per annum was involved. Mrs. Davis who began this case as a deputy administrative assistant or understudy to Passman's administrative assistant, became merely the "office supervisor" later in the proceeding (Petitioner's Supplemental Brief on Rehearing En Banc pp. 27, 31) and at present is occupying the position of "secretary" or "office worker". (Petitioner's Brief to this Court, 53, 56).

the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel,* 408 U.S. at 625.

D. As Employees of Members of Congress Share the Speech or Debate Immunity of the Members, Their Employment Relationship Should Be Immune From Judicial Scrutiny.

Indeed, the legislative function is so broad and the staff of a Congressman is so important to that function that this Court has even extended the Speech or Debate immunity to staff employees of members of Congress. *Eastland v. United States Servicemen's Fund, supra,* at 507. *Gravel, supra,* at 621; and *Doe v. McMillan,* 412 U.S. 306, at 317 (1973).

In *Gravel,* it was flatly asserted that aides were to be treated as alter egos of their Congressmen, recognizing that:

> "... it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of Congress to perform their legislative tasks without the help of aides or assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 U.S. 169, 181, 15 L.Ed.2d 681, 86 S. Ct. 749 (1966)—will inevitably be diminished and frustrated." *Gravel, supra,* at 617.

In *Gravel* it was held that Senator Gravel's aide's immunity extended to legislative acts as to which Senator Gravel himself was immune. In *Doe v. McMillan, supra,* the Supreme Court found that the Speech or Debate Clause immunity extended to the Congressional Committee's clerk, the staff director, the counsel, a consultant and an investigator for the Committee. In *Eastland v. United States Servicemen's Fund, supra,* a Senate Subcommittee's chief counsel shared the Senator's immunity.

What Appellee wishes to emphasize at this point is that because the legislative function is so broad and because the crucial importance of a Congressman's staff to the legislator's functions has been so recognized by the United States Supreme Court, a Congressman must be free to choose those members of his staff whose ". . . day-to-day work. . . is so critical to the Members' [legislative] performance. . ." *Gravel, supra,* at 617. In other words, if a Congressman and his aide are both cloaked by legislative immunity, why should not their relationship be immune from executive or judicial interference. It seems incongruous that a Congressman cannot choose who is to be his own alter ego without being questioned ". . . in any other Place. . ." about the discharge. It is submitted that the hire or discharge of a legislative staff member is itself "clearly a part of the legislative process - the due functioning of the process"[26] for which a member of Congress may not be questioned outside of the Halls of Congress. The legislative function is so important to the workings of democratic government that it

[26] *United States v. Brewster,* 408 U.S. 501, 516, 33 L.Ed.2d 507, 92 S. Ct. 2531 (1972). The crucial relationship and functions of the staff of members of Congress are clearly more intimately involved in the legislative activities of the members than were the "political" activities mentioned in *Brewster,* Id. at 512.

could even be said the nation suffers if a legislative aide cannot perform his or her assigned tasks in the manner or with the quality expected or required by the member of Congress. It is not merely another employment situation where private rights are the sole consideration.

Further, if the Speech or Debate immunity is held not to apply to Congressional personnel situations involving legislators' employees, the judicial gate will be opened to require judicial scrutiny of the legislative branch of government insofar as individuals alleged discriminatory gender-related refusals to hire, failures to promote, demotions, imposition of more onerous working conditions, refusals to assign more desirable tasks, disciplinary measures, and other similar typical personnel actions which could affect legislative staff members. The legislative functions and responsibilities are important enough and delicate enough that members of Congress should be permitted to assign a male aide to a given task for whatever reason is believed to be proper without fear of judicial intervention on behalf of an offended female aide. Conversely, a member of Congress should be permitted to assign a female aide to handle a matter for whatever reason the Congressman believes to be proper without fear of judicial questioning of the work assignment on behalf of an irate male staff member. A Congressman must be permitted to frankly pick and choose among those who will stand in his place, in his shoes, as his alter ego in Congress in order that the legislative function may be performed as he believes to be proper. Even though in a different context, the Court's statement in *Eastland v. United States Servicemen's Fund, supra,* at 508, rings true when it highlighted the principle that "... in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."

Congressman Passman's motives in discharging legislative staff member Davis are, therefore, of no legal significance if the act of discharge of a personal staff member is a legislative act and further, do not destroy the constitutionally imposed Speech or Debate immunity. Moreover, "The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove, supra,* at 376.

Further, as the Court stated in *Eastland v. United States Servicemen's Fund:*

> "In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' Dombrowski v. Eastland, supra, at 85, 18 L.Ed.2d 577, 87 S. Ct. 1425. Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference. Doe v. McMillan, 412 U.S., at 314, 36 L.Ed.2d 912, 93 S. Ct. 2018." *Eastland, supra,* at 503.

Based upon the foregoing, Defendant respectfully submits to the Court that the "sphere of legitimate legislative activity" fully encompasses the hiring and firing of legislative staff members and that, accordingly, Congressman Passman's actions herein are fully immune under the Speech or Debate Clause of the Constitution.

CONCLUSION

Based upon the reasons set forth above, and the reasons expressed in the en banc opinion below, it is respectfully urged that the judgment below be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In his brief, defendant urges this Court to adopt the extreme propositions (1) that *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), may never be applied beyond the contours of the Fourth Amendment,[1] and (2) that the Speech or

[1]That result was not suggested by the *Bivens* decision nor has it been adopted by an overwhelming number of lower federal courts. *See* list of cases collected in Br. for Petitioner at 20-23 & nn.15-17; Appendix 46-47 nn.3-4, 70-72 nn.6-8; Br. of the American Civil Liberties Union *Amicus Curiae* at 37-42; and Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials,* 4 Hastings Const. L. Q. 531, 567-68 n.229 (1977).

Debate Clause grants absolute immunity to a member of Congress for any conduct whatever and accordingly permits a member to discriminate against any congressional employee on the basis of sex. These propositions depend on standards that have never been articulated by this Court and that cannot withstand constitutional scrutiny.

I.

BIVENS COMPELS IMPLICATION OF A CAUSE OF ACTION FOR MONEY DAMAGES ON THE FACTS OF THIS CASE.

A. Defendant's Argument That *Bivens* Causes Of Action Must Be Limited to "Physical Intrusions" Or "Factual Contexts Involving Preconstitutional Notions Of Tort Law" Is Not Supported By The Rationale Of *Bivens* Itself.

Defendant argues that the *Bivens* decision turned on the principle that the United States potentially has far greater capacity to harm an individual than does a private person engaged in the same activity. Br. for Respondent at 10. He then urges that his alleged unconstitutional action was not different from any employment decision made in the private sector, and that the injury suffered by plaintiff was not sufficiently "amplified" to rise to the level of an intrusion cognizable under *Bivens*. Br. for Respondent at 10-11. This contention is similar to the view of the court below that, in order to warrant implication of a cause of action under the Fifth Amendment, the infringement of plaintiff's rights must somehow be as "direct" as was the injury to Bivens' Fourth Amendment rights. (A. 50.) Both positions are erroneous.

1. *Bivens* Decided That Violations Of Fourth Amendment Rights Give Rise To A Federal Cause Of Action For Money Damages And Was Not Limited To "Physical Intrusions."

Bivens turned on the nature of the right asserted. The issue was not whether a physical or nonphysical violation had occurred,[2] and the underlying consideration was not the magnitude of the harm done. Rather, the question decided in *Bivens* was "merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Bivens, supra*, 403 U.S. at 397.

Defendant in essence would accord such a federal remedy only to those violations of constitutionally protected interests that would also give rise to a state tort claim, for it is state tort actions that traditionally have redressed injuries to individuals for physical invasions of person or property. Taken to its logical end, this argument renders violations not capable of enforcement in state court remediable nowhere. This turns *Bivens* completely on its head. It is also insupportable as a matter of policy.

This Court in *Bivens* refused to relegate that petitioner to a state tort action, even though one presumptively existed,

[2]Even in the context of the Fourth Amendment itself, the distinction between physical and nonphysical intrusions has long been discarded. Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961). Those cases are cited in *Bivens*. 403 U.S. at 393-94. Under defendant's formulation of the *Bivens* rule, however, had Bivens' Fourth Amendment rights been violated by electronic surveillance rather than physical search, he would have had no implied cause of action under the Fourth Amendment.

and held that the Constitution gives rise to guarantees independent of any interests similarly protected by state law. 403 U.S. at 392-95. Typically, no state action exists to remedy violation of federal constitutional interests not involving physical restraint or injury to person or property. It would therefore be senseless to limit causes of action arising under the Constitution to those interests that happen to have a state common law analogue. It is precisely those interests not protected by statute or common law that require a constitutional cause of action.[3]

If the "potential for greater harm" had been a core element in *Bivens*, this Court would have limited *Bivens* causes of action to those Fourth Amendment violations where that potential had been realized. *Bivens* stands for no such principle.

There is simply no logic to defendant's argument that physical intrusions by federal officers or employees are the only acts whose consequences warrant the recognition of an implied constitutional cause of action. There is nothing inherent in the Fourth Amendment that makes the physical injury caused by its violation by federal agents necessarily greater than the injury resulting from similar activity by a private individual. Conversely, there may be federal actions of a nonphysical nature that violate a citizen's rights under other constitutional provisions and "possess a far greater capacity for harm" than would similar actions by a private

[3]Chief Justice Burger in his *Bivens* dissent acknowledged the necessity of a remedy for constitutional violations. "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric . . ." *Bivens, supra*, 403 U.S. at 415 (Burger, C.J., dissenting). *See also* Note, *Remedies for Constitutional Torts: Special Factors Counselling Hesitation*, 9 Ind. L. Rev. 441 (1976).

citizen. The specter of elected lawmakers engaging in unconstitutional activity indeed has implications far beyond that of any individual engaged in analogous misconduct.

Constitutional rights cannot be so pigeonholed. The purpose of the Bill of Rights was to limit the power of the federal government. Recognition of a cause of action where limits have allegedly been exceeded does not depend on whether or not the intrusion is physical, on whether the harm is greater or less than that resulting from some similar private invasion, or on whether or not a state remedy would lie for a similar violation. Once plaintiff has demonstrated that her Fifth Amendment rights have been violated by a federal legislator, she should be "entitled to redress [her] injury through a particular remedial mechanism normally available in the federal courts." *Bivens, supra*, 403 U.S. at 397.

2. The Cause Of Action Recognized In *Bivens* Was Not Time-Limited In Any Respect.

As an alternative to his contention that *Bivens* applies only where there has been physical intrusion, defendant argues that *Bivens* causes of action arise only in "factual contexts involving preconstitutional notions of tort law." Br. for Respondent at 6, 12. Defendant cites no Supreme Court decision for this proposition — certainly none to *Bivens* itself is possible. *Bivens* spoke of remedies for violations of constitutional rights generally, not of remedies for preconstitutional torts. There is no sensible way to distinguish among constitutional rights, providing a federal remedy for injury to some and not others and thus deeming some more worthy of protection solely because of artificial time limitations.

Defendant concedes that the Constitution is a flexible document, which embraces "constantly expanding" notions of due process. Br. for Respondent at 12. He argues, however, that because the concept of sex discrimination in employment was likely not in the minds of the Framers, it does not now rise to a remediable wrong.[4] In support of this theory, defendant cites *Adair v. United States,* 208 U.S. 161 (1908), as embodiment of the Framers' conception of the employer/employee relationship. Br. for Respondent at 12. Defendant fails to note, however, that "[this Court's] course of decisions . . . since *Adair v. United States,* [*supra*], and *Coppage v. Kansas,* 236 U.S. 1 [1915], have completely sapped those cases of their authority." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 187 (1941) (citations omitted).[5]

The Constitution is not frozen in time.[6] Even notions of unconstitutional search and seizure, for example, have

[4]Defendant concedes, however, that discrimination based upon classification by sex is protected by the Fifth Amendment Due Process Clause. Br. for Respondent at 9 n.4.

[5]The demise of *Adair* and the cases it relied on, Lochner v. New York, 198 U.S. 45 (1905), and Allgeyer v. Louisiana, 165 U.S. 578 (1897), is not uninstructive. *Adair* held unconstitutional, as violative of the employer's Fifth Amendment rights, a provision of an 1898 interstate commerce act that prohibited discrimination in employment on the basis of union membership. Liberty of contract was the only right addressed. Nowhere were an individual employee's First Amendment rights considered. The subsequent discrediting of these and the entire line of cases holding similarly and relying on notions of substantive due process is evidence that concepts of constitutionality evolve and expand to accommodate the dictates of social change.

[6]*See, e.g.,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring) ("Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring

(continued)

changed to reflect current needs, and the decision in *Bivens* was not limited to the Framers' vision of the Fourth Amendment. *See Bivens, supra,* 403 U.S. at 393-94 and n.2, *supra.* It is now well established that sex is one of the classifications granted equal protection scrutiny under the Fifth Amendment. *See* Br. for Petitioner at 11-12 and cases cited therein; n.4, *supra.* If this Court is willing to recognize that notions of constitutional rights expand to comport with the demands of contemporary society, then it should similarly recognize the existence of remedial mechanisms for violations of those same rights. Refusal to do so would turn those rights into meaningless rhetoric and extend a license to those who would violate them.

B. There Are No "Special Factors Counselling Hesitation" To Imply A *Bivens* Cause Of Action Here.

In deciding that a cause of action was implied under the Fourth Amendment, the *Bivens* Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, supra,* 403 U.S. at 396.[7] Neither was there an "explicit congressional declara-

(footnote continued from preceding page)
fundamental justice, it is also a living principle not confined to past instances."); Weems v. United States, 217 U.S. 349, 373 (1910) ("In the application of a constitution . . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. . . . Rights declared in words might be lost in reality.")

[7]Examples of the kind of "factors" the Court deemed relevant were those situations where the United States, as party plaintiff, had the power to create the liability sought to be inferred and those where no constitutional prohibition was involved. *Bivens, supra,* 403 U.S. at 396-97 (citing United States v. Standard Oil Co., 332 U.S. 301 (1947) and Wheeldin v. Wheeler, 373 U.S. 647 (1963)).

tion," short of "affirmative action," that persons injured as a consequence of Fourth Amendment violations by a federal officer might not recover money damages from the agent personally. *Bivens, supra,* 403 U.S. at 397. The *Bivens* Court suggested that such an "explicit declaration" might be a special factor counselling hesitation to imply a cause of action from the Constitution itself, but required in that case that the individual "must . . . be remitted to another remedy, equally effective in the view of Congress" *Id.*

Defendant urges that a number of "special factors" counsel hesitation to imply a cause of action from the Fifth Amendment in the instant case. Br. for Respondent at 13-23. These are not the kind of "special factors" with which *Bivens* was concerned. Rather, they speak to pragmatic and political considerations that cannot properly be balanced against plaintiff's Fifth Amendment rights. Moreover, under close examination, it is apparent that even on their own terms these arguments are lacking in merit.

1. Docket Considerations Cannot Justify Prohibiting Plaintiff From Redressing The Injury To Her Constitutional Rights. In Any Event, No New Floodgates Will Be Opened By Implying A *Bivens* Cause Of Action Here.

Judicial application of *Bivens* to constitutional amendments other than the Fourth has neither precipitated nor threatened the opening of "floodgates." As defendant acknowledges, every court of appeals has, in the six and one-half years since *Bivens* was decided, addressed the question whether *Bivens* applies to amendments other than the Fourth. Br. for Respondent at 14. Nine of these courts, as well as countless district courts, have held in the

affirmative.[8] No court of appeals, with the exception of the court below, has suggested that *Bivens* created an unmanageable workload; moreover, claims arising under constitutional causes of action have been regularly heard in the federal courts without unduly burdening the system.

Docket considerations may not be permitted to control access to the federal judiciary when constitutional rights are at stake. *See Bivens, supra,* 403 U.S. at 391 n.4; *id.* at 410-411 (Harlan, J. concurring); *Bell v. Hood,* 327 U.S. 678, 681-83 (1946).[9] If this Court denies plaintiff an implied cause of action, however, it will close the courthouse doors without justification not to a new flood of cases but rather to vindication of federal civil rights in those limited situations where statutory remedies do not exist. State action claims and actions against municipalities are already cognizable under 42 U.S.C. §1983. *Monell v. New York City Dept. of*

[8] *See* Br. for Petitioner at 20-23 nn.15-17 and n.1, *supra.* The Seventh Circuit has now definitively recognized that *Bivens* applies to claims arising under constitutional amendments other than the Fourth, including the Fifth Amendment Due Process Clause. Green v. Carlson, 581 F.2d 669 (7th Cir. 1978) (Fifth and Eighth Amendments), *petition for cert. filed,* 47 U.S.L.W. ___ (U.S. Feb. 13, 1979) (No. 78-1261); Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1978) (First and Eighth Amendments). A petition for certiorari has also been filed in Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), *sub nom.* Moffitt v. Loe, 47 U.S.L.W. ___ (U.S. Feb. 13, 1979) (No. 78-1260). Both petitions raise the question whether a *Bivens* cause of action should be implied where the Federal Tort Claims Act provides an alternative and effective remedy; they do not question whether *Bivens* should be applied where no other remedy exists. *See* Carlson v. Green, Pet. for Certiorari at 14.

[9] The en banc majority premised its concern over floodgates upon its perception of the vast sweep of the Fifth Amendment Due Process Clause. (A. 54-55, 56-57.) Should this Court choose to recognize plaintiff's *Bivens* cause of action on narrower grounds, a limiting principle is suggested by the American Civil Liberties Union *amicus curiae.* Plaintiff's equality-based claim can be fully addressed here without reference to procedural due process or substantive due process

(continued)

Social Services, 436 U.S. 658 (1978).[10] The courts have successfully handled *Bivens* causes of action for violation by federal agents of any number of constitutional protections. Thus, the only potential new "flood" of cases would be those presenting fact situations exactly analogous to that of plaintiff. It cannot be presumed that federal legislators regularly violate the constitutional rights of their employees. To the extent that they do, the possibility of a *Bivens* cause of action might well act as a deterrent.

Defendant's argument is erroneous in another respect. Defendant, relying on Mr. Justice Rehnquist's dissenting opinion in *Butz v. Economou,* 98 S. Ct. 2894, 2921 (1978), cites the increase in suits brought under *civil rights*

(footnote continued from preceding page)
claims that may be raised by other plaintiffs in other cases. Br. of the American Civil Liberties Union *Amicus Curiae* at 8 & n.8; 26 & n.20.

[10]This Court's decision in *Monell* destroyed the rationale of the First Circuit in Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), in which that court — the only court of appeals except the lower court below to refuse to apply *Bivens* outside the Fourth Amendment — declined to imply a cause of action under the Fourteenth Amendment against a municipality sued on a vicarious liability theory. A statutory remedy under 42 U.S.C. §1983 existed against those persons directly responsible for plaintiff's injuries, and the First Circuit rested its decision on the adequacy of that remedy. *See* Br. for Petitioner at 23 n.17.

Petitioner notes that Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc), has been vacated and remanded *sub nom.* City of West Haven v. Turpin for further consideration in light of *Monell.* 99 S. Ct. 554 (1978). This action and the similar remand of Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), vacated and remanded for further consideration in light of *Monell,* 98 S. Ct. 3118 (1978), have no bearing on the rationale of those circuits in implying *Bivens* causes of action. *See* Owen v. City of Independence, Nos. 76-1758, 76-1799 (8th Cir. Dec. 1, 1978) (Slip Op. at 1) (Opinion on Remand). Indeed, both circuits have applied *Bivens* beyond the Fourth Amendment to cases not involving municipalities or have indicated their willingness to do so. *See* Br. for Petitioner at 20-23 nn.15-17; A. 70-72 n.6. Certiorari was granted in Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978), *sub nom.* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 436 U.S. 943 (1978), not on the *Bivens* issue — as defendant implies, Br. for Respondent at 10 & n.5 — but rather on immunity questions not presented here.

statutes in the years 1961 to 1977 and urges that those statistics warrant foreclosing the *Bivens* remedy. Br. for Respondent at 15. This inquiry entirely misses the point. First, plaintiff's case is brought under the Constitution, not under any civil rights statute. Second, if one wishes to gauge the effect upon the federal judiciary of suits brought under implied constitutional causes of action, only the period after the *Bivens* decision in 1971 can appropriately be included. Neither consideration is reflected in the statistics cited by defendant.

Moreover, there is no factual support for defendant's assertion that the caseload of the federal judiciary can be expected to increase. The 1978 Annual Report of the Director of the Administrative Office of the United States Courts, published August, 1978, demonstrates that cases brought under civil rights statutes *declined* in 1978 by 2.2% from the previous year, with filings involving employment showing a 7.2% decrease. *Id.* at Table 18 and pp. 61, 83. Neither as a matter of theory, then, nor as a matter of fact, should the specter of "floodgates" cause this Court to hesitate in permitting plaintiff to proceed.

2. Recognizing Plaintiff's Cause Of Action Arising Under The Fifth Amendment Will Not Inhibit Federal Legislators Any More Than The Availability Of A *Bivens* Cause Of Action Arising Under The Fourth Amendment Has Inhibited Other Federal Officials Or The Availability Of A Statutory Cause Of Action Under 42 U.S.C. §1983 Has Inhibited State Officials.

Plaintiff's suit in no way attempts to limit or inhibit the legitimate actions of federal legislators, but rather seeks only to ensure that, if constitutional rights are violated, a forum for their remedy exists. Defendant has raised all the

horribles traditionally paraded any time the action of one coordinate branch arguably impacts the activities of another. Br. for Respondent at 16-17. His argument fails to acknowledge, however, the protection enjoyed by members of Congress under the Speech or Debate Clause — a protection unique to that Branch. It is only for those unconstitutional actions that lie outside the ambit of the Speech or Debate Clause that a member might be subject to liability.[11]

It is error to suggest that legislators' supposed "risk of bankruptcy" and "fear of large money judgments," Br. for Respondent at 16, 17,[12] can be balanced against plaintiff's Fifth Amendment rights. Thus, defendant's contention does not counsel hesitation to recognize plaintiff's cause of action here. Moreover, a bar to liability is provided by the Speech or Debate Clause where it applies. *See* Br. for Petitioner at 50-62 and pp. 20-24, *infra*. Congress can also provide an alternative but equally effective remedial mechanism for the redress of injury to its employees' constitutional rights. *Bivens, supra*, 403 U.S. at 397; *Brown v. General Services Administration*, 425 U.S. 820

[11]Defendant quotes the dissenting opinion of Mr. Justice Rehnquist in Butz v. Economou, *supra*, to support the proposition that granting plaintiff a cause of action will discourage both "federal action" and "even federal employment." Br. for Respondent at 16. Defendant fails to mention that that point was thoroughly considered and rejected by the *Butz* majority. Butz v. Economou, *supra*, 98 S. Ct. at 2911 & n.35. More importantly, he also fails to consider the differences between federal legislators and federal executives for these purposes. Justice Rehnquist's concerns were raised in the context of determining whether federal officials enjoy absolute rather than qualified immunity. If the former, suit is barred; if the latter, the official must mount a good faith defense at trial. Because a legislator enjoys the absolute immunity of the Speech or Debate Clause for activities falling within its ambit, the time and expense concerns raised by defendant will arise, if ever, only in those instances where a claim arises outside its sphere.

[12]Of course, very few members of Congress can be expected to discriminate and accordingly very few money judgments should ensue.

(1976). What Congress cannot do is deny plaintiff all remedies for violation of her constitutional rights when the absolute immunity provided by the Speech or Debate Clause is inapplicable.

Suits have proceeded under 42 U.S.C. §1983 against state officials since 1871 and against federal officials under the authority of *Bivens* since 1971. There is no evidence that state or federal officials have been less vigorous in performance of their duties because they can be sued for money damages. The harassment defendant fears can occur regardless of the filing of a lawsuit. The formality of a complaint filed in court will have no greater impact than a complaint aired on television or in the newspapers and will not of itself lose an election for a member of Congress charged with unconstitutional behavior. The governing assumption, in any event, is that the public's elected representatives will support and defend the Constitution. Plaintiff's lawsuit affects only those very few who do not.

3. The Silence Of Congress In Amending Title VII Of The Civil Rights Act Of 1964 Can Neither Be Construed As An "Affirmative Action" Counselling Hesitation Nor An "Explicit Declaration" That Plaintiff May Not Redress Injury To Her Constitutional Rights By An Implied Cause Of Action Under The Fifth Amendment.

Plaintiff has already addressed the error committed by the court below when it relied heavily on the fact that, in amending Title VII of the Civil Rights Act, Congress did not provide a statutory remedy for noncompetitive congressional employees, and concluded that Congress intended such persons to be remitted to no remedy

whatever. Br. for Petitioner at 41-45. Defendant builds upon the lower court's error, looking to the legislative history of the 1972 amendments to that Act and to this Court's decision in *Brown v. General Services Administration*, 425 U.S. 820 (1976), and drawing sweeping and erroneous conclusions. Br. for Respondent at 17-21.

The policy of the United States with respect to discrimination in employment by members of Congress is affirmatively stated in 5 U.S.C. § 7151. Plaintiff submits that this is precisely the kind of "explicit declaration" the *Bivens* Court would have looked to. Rather than counselling hesitation, however, this declaration urges implication of a cause of action here.

Brown v. General Services Administration, supra, held nothing to the contrary. In deciding whether Title VII provided the exclusive individual remedy available to a federal employee alleging racial discrimination in employment, the *Brown* court acknowledged that "[a]lthough federal employment discrimination *clearly violated both the Constitution, Bolling v. Sharpe,* 347 U.S. 497 (1954), *and statutory law, 5 U.S.C. § 7151,* before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure." *Brown, supra,* 425 U.S. at 825. (Emphasis added.)[13] The *Brown* Court tacitly admitted that Congress was incorrect in believing that judicial relief was unavailable to federal employees treated

[13]It must be emphasized that the reasons advanced for "doubt" went to the availability of the sovereign immunity defense. *Brown, supra,* 425 U.S. at 825-27 & n.8 Of course, there was no court decision directly on point. Because this is a suit against an individual, rather than the United States, sovereign immunity is inapposite.

discriminatorily. 425 U.S. at 828.[14] However, in deciding the narrow question presented, the Court considered important "not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Id.*

Plaintiff does not challenge the conclusion of *Brown* that Title VII is preemptive and exclusive where it applies. But Title VII does not apply to plaintiff. And the Court in *Brown* did not rule whether a cause of action was implied under either the Constitution or 5 U.S.C. § 7151 when it noted that discrimination in federal employment violated both. The legislative history of the 1972 amendments to Title VII is silent as to noncompetitive congressional employees. Neither the silence of the legislative history, nor the silence of the Act itself, can properly be interpreted to mean that Congress intended that its employees should have no remedy for violation of their right to be free of unconstitutional discrimination in employment.[15]

[14]The dissenting opinion is unequivocal that "Congress incorrectly assumed that federal employees would have no judicial remedy if §717 had not been enacted . . ." Brown v. General Services Administration, *supra,* 425 U.S. at 837 (Stevens and Brennan, J.J., dissenting).

[15]Such a result would itself be unconstitutional and would subvert the mandate of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to the federal judiciary. Congress may not deny all remedies to a federal litigant by divesting the judiciary of the power to adjudicate the merits of a constitutional case properly within its subject matter jurisdiction. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1366, 1399 (1953); Br. of the American Civil Liberties Union *Amicus Curiae* at 10-11, 13-17.

4. The Implication Of A Cause Of Action Here Does No Violence To The Doctrine Of Separation Of Powers.

Relying on the formulations of *Baker v. Carr,* 369 U.S. 186 (1962), for determining political questions, defendant now urges a proposition raised only in his petition for rehearing en banc: that permitting petitioner to pursue a judicial remedy against a member of Congress for unconstitutional sex discrimination in employment violates the doctrine of separation of powers. Br. for Respondent at 21-23. Plaintiff has anticipated and addressed this contention in her opening brief. *See* Br. for Petitioner at 62-66.

Separation of powers is expressly ensured by operation of the Speech or Debate Clause. *United States v. Johnson,* 383 U.S. 169, 178 (1966); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson,* 103 U.S. 168, 190-200 (1880). That Clause does not confer immunity on defendant here. *See* Br. for Petitioner at 50-62, and pp. 20-24, *infra.* Since defendant's activities fall outside the protection constitutionally mandated for legislators, there is no reason for this Court to abstain from recognizing plaintiff's cause of action. "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951) (citations omitted).

The separation of powers doctrine governs the relationship of the judiciary with the other institutions — not that of the judiciary with an individual.[16] Petitioner asks this Court

[16]Defendant argues that members of Congress are better equipped to make judgments about proper performance of their staff than is the judiciary. Br. for Respondent at 21 n.16. Performance is not the issue here. Defendant admits plaintiff is an "extremely capable secretary." *(continued)*

to do no more than perform its traditional and special function — interpreting the Constitution. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). As this Court held in *Powell v. McCormack,* 395 U.S. 486 (1969) — a case involving far greater intrusion into the affairs of the legislature than does the instant case, which merely probes the employment practices of one legislator — separation of powers considerations do not bar plaintiff's suit:

> ". . . [A]s our interpretation of Art. I, §5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' *Baker v. Carr,* 369 U.S. 186, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that

(footnote continued from preceding page)

(A. 6.) At issue is whether the judiciary can determine whether the criterion of sex was unconstitutionally brought to bear in the employment relationship. *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (reiterating the *Baker* formulations and holding that Art. 1, § 5, providing that the House of Representatives was to "be the judge of the qualifications of its own members," did not bar judicial review of the exclusion of Representative Powell on political question grounds); Bond v. Floyd, 385 U.S. 116 (1966) (this Court may determine whether Georgia House of Representatives' disqualification of Representative Bond violated his First Amendment rights); United States v. Helstoski, 576 F.2d 511, 518-19 (3d Cir.) *cert. granted,* 99 S. Ct. 719 (1978) (No. 78-349) (separation of powers, supporting speech or debate immunity, no bar to trying and convicting congressman on indictment; issue not raised on certiorari).

such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack, supra,* 395 U.S. at 548-49 (footnote and citations omitted).

The issue here is a constitutional one. Petitioner requests redress for violation of her Fifth Amendment rights. The remedy sought, as in *Bivens,* is money damages. Contrary to defendant's contentions, *see* Br. for Respondent at 22, this case does not present questions regarding the authority of the court to impose equitable remedies arguably analogous to those available under Title VII. The same considerations advanced by defendant regarding judicial "examination" of the legislature existed in *Bivens* regarding judicial scrutiny of the actions of the Executive Branch. This Court did not prohibit the recovery of damages from executive officials, although review of their activities by federal judges is required. Similarly, this Court should not prohibit the recovery of damages from federal legislators where the Speech or Debate Clause provides no immunity from liability.[17]

5. The Speech Or Debate Clause Is Not A Special Factor Counselling Hesitation.

Defendant only obfuscates the issues when he argues that the "existence of the Speech or Debate Clause itself is a special factor in this case warranting hesitation in the expansion of *Bivens.*" Br. for Respondent at 23.

[17]Title VII also permits the kind of judicial "interference" with the "internal workings" of the Executive Branch for statutorily proscribed employment discrimination that would be required in the instant case in the constitutional framework. There is no evidence that the "harassment" and "dictation" to a coordinate branch augured by defendant have materialized in that context.

The question whether plaintiff has a cause of action cognizable in federal court under 28 U.S.C. § 1331(a) jurisdiction is distinct from the question whether defendant, as a member of Congress, is absolutely immune from liability by virtue of the operation of the Speech or Debate Clause.[18] The Speech or Debate Clause ensures the guarantee of separation of powers, *United States v. Johnson,* 383 U.S. 169, 178 (1966), and provides absolute immunity for actions of members of Congress that fall within the "sphere of legitimate legislative activity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Plaintiff has never argued to the contrary. Rather, in the context of defendant's attempt to invoke the immunity conferred by the Clause, plaintiff has argued that his actions are outside the scope of its protection as interpreted by this Court.[19] Br.

[18]The cause of action sought here presumptively would be available to any congressional employee who could allege a violation of constitutional rights. The immunity provided by the Speech or Debate Clause, however, would operate to bar (1) those lawsuits where the act complained of was within the legislative sphere, regardless whether an individual's constitutional rights were in fact violated, and (2) those lawsuits where the functions of the employee involved were such as to make that individual an alter ego of the member of Congress. Neither situation is present here.

[19]Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

Since plaintiff's opening brief was submitted, this Court has granted certiorari in two cases which also require delineation of the parameters of the Speech or Debate Clause. Hutchinson v. Proximire, 579 F.2d 1027 (7th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3463 (U.S. Jan. 8, 1979) (No. 78-680); United States v. Helstoski, 576 F.2d 511 (3rd Cir.) *cert. granted,* 99 S. Ct. 719 (1978) (No. 78-349). Both cases involve actions of congressmen arguably more "essential to legislating" than is defendant's conduct here.

for Petitioner at 50-62 and pp. 20-24, *infra*. The fact that *some* actions of a congressman — including those respecting the employment of *some* congressional aides — are insulated from judicial review has no bearing on the question whether plaintiff should be permitted access to the federal courts.[20]

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY TO DEFENDANT FROM LIABILITY FOR UNCONSTITUTIONAL SEX DISCRIMINATION ON THESE FACTS.

In arguing that the Speech or Debate Clause provides "absolute immunity from judicial inquiry into the hiring and firing of personal staff employees," Br. for Respondent at 25-34, defendant urges an interpretation of the Clause never articulated by this Court. Moreover, in requesting this sweeping reading and in arguing, *inter alia*, that his conduct in the case at bar is protected by the Clause, defendant strays from the facts in several material respects.

Plaintiff performed ably and efficiently in her employment by defendant. Defendant commended plaintiff as "able," "energetic," "command[ing] the respect of those with whom you work," "talent[ed]," experience[d]," and an "extremely capable secretary." (A. 6.) Defendant

[20]If anything, defendant's argument urges the reverse interpretation. Because the Speech or Debate Clause provides no immunity to defendant on the facts of this case, it can accordingly counsel no hesitation in implying a cause of action here.

cannot now contend that he was impeded in his ability to assemble an effective staff, or that plaintiff failed adequately to assist him in performing his legislative functions. Br. for Respondent at 28. To the contrary, defendant has stated that "the contribution [of plaintiff] to [defendant's] Washington Office . . . helped all of us," including the "humble Congressman." (A. 7.)[21]

The nature of plaintiff's responsibilities is "critical," *Elrod v. Burns*, 427 U.S. 347, 367 (1976), to a determination whether defendant should be entitled to absolute immunity for all actions — even unconstitutional sex discrimination — with respect to the employment relationship. Defendant correctly cites *Gravel v. United States*, 408 U.S. 606, 617 (1972), for the proposition that an aide acting as the alter ego of the member is entitled to speech or debate protection for activities which, if performed by the member, would be so protected.[22] Defendant then argues that because the member and his aide are both cloaked by legislative immunity in this context, their entire employment relationship must be immune from judicial review. Br. for Respondent at 31. This contention is erroneous. The scope of the immunity accorded the employment relationship can be no greater than the scope of the immunity accorded to a congressional employee by *Gravel*. Defendant departs from the holding of *Gravel* in urging speech or debate protection for his actions here.

[21]These assessments, for purposes of the present proceeding, must be taken as true.

[22]Plaintiff does not contest the wisdom of extending the speech or debate privilege to high level staff members in policy-making positions, such as legislative aides, Gravel v. United States, 408 U.S. 606 (1972), or committee counsel, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), where the activities of the member and the employee are not distinguishable. Plaintiff, however, was described by defendant as a "secretary." (A. 6,7).

Defendant has never before suggested that plaintiff stood "in his place, in his shoes, as his alter ego in Congress." Br. for Respondent at 32. Nor could he. Defendant's letter of termination spoke only of plaintiff's ability as an "extremely capable secretary." (A. 6,7.)[23] And his brief to this Court, with its extraordinary insistence that in typing

[23]Defendant implies that plaintiff's salary ($18,000 annually, with expectation of promotion to $32,000 annually) and title suggest that her job functions were of a level higher than secretarial. Br. for Respondent at 29 n.25. This inference is belied by his own letter of dismissal. Defendant worried that a secretary of such "talent and experience" would be "waste[d]" at his Monroe office because of the "low salary" available. This concern was advanced twice, and defendant also offered letters of recommendation so that plaintiff could seek employment with organizations that could take advantage of a "secretary with [her] ability." (A. 6,7.)

Defendant's implication is also belied by the Report of the Clerk of the House from January 1, 1974 to June 30, 1974, H.R. Doc. No. 340, 93d Cong., 2d Sess. (1974) ("Report"), listing salaries paid by job title to each employee of a member of Congress during the period. At least seventy-five *other* representatives had a "secretary," "executive secretary," "personal secretary," or "office manager" earning $9,000 or more semiannually ($18,000 annually); twelve of these members had more than one in that job description and that salary bracket. Report at 3-152. Another thirty-three members had at least one such employee earning more than $8,000 semiannually. Report at 3-152. Additionally, five members had a "secretary" or an "executive secretary" earning more than $16,000 semiannually ($32,000 annually), and two others had such employees earning more than $15,000 seminannually. Offices of Honorables Albert, Bolling, Flood, Herbert, Widnall. Report at 4, 15, 49, 64, 144; Offices of Honorables Boggs, Jarman. Report at 14, 72. Finally, six members had at least one "secretary," "personal secretary," or "executive secretary" earning a salary comparable to or more than his "administrative assistant." Offices of Honorables Bolling, Fisher, Flood, Herbert, M. Murphy, Nichols. Report at 15, 48, 49, 64, 98, 100. Plaintiff's salary, whether received or anticipated, was thus no different from that paid many other secretarial employees of members of Congress at that time.

and taking dictation a secretary is engaged in legislative activities, Br. for Respondent at 28-29, is tacit acknowledgment that those were precisely the roles performed by plaintiff. There is no plausible interpretation of these facts that would render plaintiff the surrogate of defendant,[24] and accordingly no interpretation of the Clause that would render defendant immune from suit for his unconstitutional sex discrimination in firing plaintiff.

The interpretation of the Clause urged by defendant would make it applicable to *every* action of a congressman, no matter how remote to legislating, and would protect his *every* activity in regard to *every* congressional employee. It would immunize the congressman from suit for failure to pay federal income tax, suit for default on a mortgage or execution of a contract, suit for personal injury attendant to an automobile accident, and prosecution for assault and battery. Any of these legal actions would impact against the legislative function since they consume the legislator's time and resources. But it has never been suggested that a legislator can escape all legal responsibility. *Gravel v. United States, supra,* 408 U.S. at 615; *Butz v. Economou,* 98 S. Ct. 2894, 2910-11 (1978), *citing United States v. Lee,* 106 U.S. 196, 220 (1882); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Scheuer v. Rhodes,* 416 U.S. 232, 239-40 (1974). *See United States v. Brewster,* 408 U.S. 501 (1972). Defendant's interpretation of the Clause also would, under the same logic, protect all congressional staff from all lawsuits, for defendant does not link the

[24]*And see* Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880), holding legislative employees liable for their activities regardless of the immunity accorded the member of Congress.

immunity to performance of "legislative" or policymaking functions.[25] In effect, defendant asks this Court to overrule all its prior decisions that limit the breadth of the Speech or Debate Clause.[26]

The contentions of defendant not only rob the Speech or Debate Clause of all meaning but also offer nothing to distinguish this case from one involving any employer and one of his several secretarial employees. The rapport of a congressman with his clerical employees is no more "essential" than that required in many private sector jobs or even in those public sector jobs already covered by employment discrimination legislation. Indeed, defendant himself argues that "[i]ndividuals are hired and fired every day and the impact is the same regardless of whether the employer [is] governmental or private," and "[t]here is nothing inherent in government which makes an employment decision by a government official to discharge an individual have any greater effect on the discharge merely because the employer [is] the government." Br. for Respondent at 11.

The policy of the United States, express and implied, is to discourage all forms of employment discrimination that intrude on statutorily or constitutionally protected interests like race or sex. Defendant advances no arguments that would warrant distinguishing his situation from others that are outside the scope of the Speech or Debate Clause as interpreted by this Court in its past decisions.

[25]This Court has upheld the validity of such distinctions in the context of patronage dismissals. Elrod v. Burns, 427 U.S. 347, 367, 372 (1976). *See* Br. for Petitioner at 58-59. In so doing, it has emphasized that the nature of job responsibilities, rather than job title, is "critical." *Id.* at 367.

[26]*See, e.g.,* Doe v. McMillan, 412 U.S. 306, 317 (1973) (Speech or Debate Clause has "finite limits"); Gravel v. United States, *supra,* 408 U.S. at 621, 625 (protected activities must be "essential to legislating" and an "integral part" of the legislative process); United States v. Brewster, *supra,* 408 U.S. at 516 (privilege does not include "all things in any way related to the legislative process").

CONCLUSION

For all the foregoing reasons, as well as those stated in plaintiff's opening brief, the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

—v.—

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

-v.-

OTTO E. PASSMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS[1/]

The American Civil Liberties Union (ACLU) is a non-partisan membership organ-

1/ Consents to the filing of a brief amicus curiae have been obtained from all parties and have been lodged with the clerk's office.

ization of over 200,000 persons devoted to the protection of rights secured by the United States Constitution. The decision of the en banc majority of the Fifth Circuit in this case poses a threat to the power of Federal courts to utilize traditional judicial remedies in order to vindicate constitutional rights. Since constitutional rights without adequate remedies are a mere form of words, the ACLU submits this brief amicus curiae in support of the historic remedial power of Article III courts.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

In 1974, Shirley Davis worked for Congressman Otto E. Passman in his Washington office as a Deputy Administrative Assistant. Although she apparently performed her duties in a satisfactory manner, Ms. Davis was dismissed on July 31, 1974. Congressman Passman, in dismissing Ms. Davis, noted:

> You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington office, and the

> diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion. 571 F.2d at 806, n. 1.

Ms. Davis did not "agree" with Rep. Passman's apparent "conclusion" that male gender is an occupational qualification for any administrative job above secretary. Instead, she commenced this lawsuit seeking re-instatement and back-pay.[2/] Her complaint alleges that, in dismissing her solely because she is a woman, Rep. Passman acted in violation of the guarantee of equal treatment contained in the Due Process clause of the Fifth Amendment.[3/]

Although troublesome procedural questions are raised by Ms. Davis' lawsuit,

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2/ In light of Rep. Passman's retirement, Ms. Davis has abandoned her demand for reinstatement.

3/ Unlike the Fourteenth, the Fifth Amendment contains no explicit guarantee of equal treatment. However, this Court has repeatedly recognized that the Due Process guarantee of the Fifth Amendment subsumes a right to equal treatment which is similar to, if not identical with, the right derived from the Equal Protection Clause of the Fourteenth Amendment. See generally, Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Bolling v. Sharp, 347 U.S. 497 (1954). See also, Schneider v. Rusk, 377 U.S. 163, 168 (1964).

several issues do not appear substantial. First, taking the allegations of her complaint as true, Ms. Davis presents a formidable case on the merits. Overt discrimination in Federal public employment on the basis of sex, in the absence of a bona fide sex based occupational qualification, violates both Title VII, as amended in 1972, and the Fifth Amendment.[4/] Thus, the issues posed by Ms. Davis' attempt to enforce her Fifth Amendment right to equal treatment are issues of remedy rather than issues of right.[5/] Second, Congress has unquestionably granted subject matter jurisdiction to the Federal District courts to entertain petitioner's claim for relief. Since the

4/ Ordinarily, Federal courts would not be called upon to explore the Fifth Amendment claim, since Congress amended Title VII in 1972 to provide an alternative method of vindicating the rights involved. Brown v. General Services Administration, 425 U.S. 820 (1976). Plaintiff, as a non-civil service employee of the Congress, is not covered by the remedial scheme established by 42 U.S.C. § 2000e-16(a). Accordingly, her only source of protection is the Fifth Amendment.

5/ Of course, it remains open to Rep. Passman at trial to establish a sex based occupational qualification for the job. Moreover, Rep. Passman may well be entitled to a good faith defense.

source of petitioner's right is the guarantee of equal treatment embedded in the Fifth Amendment, her claim for relief arises under the Fifth Amendment within the meaning of 28 U.S.C. §1331(a). E.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946). Unlike the Fourth Amendment privacy-based claims at issue in Bivens, Ms. Davis' equality based claims find no analogue at common law. Thus, it is not even open to respondent to argue, as did the Solicitor General in Bivens, that petitioner's claims arise under state law, with the Federal Constitution acting solely to limit a possible defense based upon government justification or immunity.[6/] Hart, The Relations

6/ The lack of a state common law analogue for Ms. Davis' equality-based claim belies the suggestion of the en banc majority that she possesses an alternative remedy in a state court. Even if Ms. Davis elected to attempt to overrule Tarble's Case, 13 Wall. 397 (1872), by seeking relief against Congressman Passman in a state court, the source of her right would continue to be the Fifth Amendment and she would, thus, be confronted with the identical remedial problems. Surely, the en banc majority did not intend to suggest that a state

(FN 6 continued on next page)

Between State and Federal Law, 54 Colum. L. Rev. 489 (1954); Louisville & Nashville R. R. Co. v. Motley, 211 U.S. 149 (1908). Third, given the clear existence of § 1331(a) jurisdiction,[7] the difficult issue of

(FN 6 continued)

court would be free to provide a remedy for Ms. Davis' Fifth Amendment claim while a Federal court would lack power to provide a remedy. It is true that this Court has required state courts to make effective remedies available to plaintiffs asserting Federal constitutional claims. E.g., Testa v. Katt, 330 U.S. 386 (1947); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 637 (1960). See also, Poindexter v. Greenhow, 114 U.S. 270 (1894). However, it has never been suggested that state courts possess a greater remedial power in constitutional cases than do their Article III counterparts. Indeed, the assumption has always been quite the contrary. Tarble's Case, supra.

7/ A puzzling, and clearly incorrect, aspect of the decision of the en banc majority is its insistence on dismissing Ms. Davis' claim on jurisdictional grounds. 571 F.2d at 801. Whatever the ultimate resolution of the remedial issues posed by this case, petitioner's claim to equal treatment arises under the Fifth Amendment for jurisdictional purposes. Indeed, no alternative source of legal right exists in a "Federal" equality case. This Court has twice corrected a similar confusion of jurisdiction and remedial power
(FN 7 continued on next page)

the power of an Article III court to protect constitutional rights in the absence of a clear subject matter jurisdictional base is not presented. See generally, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953), reprinted in Hart & Wechsler's, The Federal Courts and the Federal System (2d.) at 330-360. See also, Oestereich v. Selective Service System Local Board 11, 393 U.S. 233, 243-244 n.6 (1968)(Harlan, J. concurring). Finally, given the traditional nature of the compensatory relief sought by Ms. Davis, this case does not involve the power of a Federal court to evolve non-traditional remedies to redress constitutional violations. E.g., Mapp v. Ohio, 367 U.S. 643 (1961).

Two substantial issues are, however, presented by Ms. Davis' complaint. First,

(FN 7 continued)

in Bell v. Hood, 327 U.S. 678 (1946) and Bivens, supra, only to have it apparently re-appear in the decision of the en banc majority. If dismissal in this case were appropriate at all, it would only be because Ms. Davis' claim is one on which relief cannot be granted. F. R. Civ. Pro. Rule 12(b)(6).

may a Federal District court, in the absence of Congressional authorization, utilize an award of compensatory damages to vindicate the right to equal treatment embedded in the Fifth Amendment? Second, assuming the general availability of a damage remedy in a Fifth Amendment equality case, may such a remedy be invoked against a member of Congress to redress discriminatory staff hiring practices?

A divided panel of the Fifth Circuit initially answered both questions in the affirmative. 544 F2d 865 (5th Cir. 1977). A majority of the Fifth Circuit sitting en banc reversed. 571 F.2d 793 (5th Cir. 1978). The en banc majority considered only the first question, ruling that despite Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), rights sounding in the Due Process clause of the Fifth Amendment[8/] may not be enforced by an award of

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8/ The en banc majority made no attempt to differentiate between equality based Fifth amendment claims, such as Ms. Davis', and procedural or substantive due process claims which may also arise under the Due Process clause of the Fifth Amendment. Obviously, the issues surrounding the implementation of a remedial award in a procedural due process case may differ radically from the remedial concerns in an equality case. Cf. Carey v. Piphus, ___US ___ (1978).

compensatory damages in the absence of Congressional authorization.[9/] Accordingly, the en banc majority found it unnecessary to consider whether Article I, §6 (the speech or debate clause) or general considerations of separation of powers bar a damage award against Rep. Passman.[10/]

9/ The en banc majority appeared to endorse the accepted practice of enforcing the Fifth Amendment's guarantee of equality by injunctive relief despite the absence of explicit Congressional authorization. 571 F.2d at 800. See generally, Bolling v. Sharp, 347 U.S. 497 (1954). No attempt was made to explain why a Federal court possesses inherent equitable remedial power in Fifth Amendment equality cases such as Bolling, but lacks the less intrusive power to award compensatory relief. Bivens v. Six Unknown Agents, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). Given the "back pay" motive of Ms. Davis' demand for relief, it would be possible to characterize her claim as one for equitable, as opposed to compensatory, relief. Back pay in an employment discrimination case has been viewed by many courts as an "equitable" remedy.

10/ Judge Jones concurred on separation of powers grounds. 571 F.2d 801. Judge Roney concurred on the novel ground that only claims grounded in pre-constitutional common law rights may found the basis of a Bivens damage award. 571 F.2d 802. Judges Goldberg and Brown, dissenting, adhered to the view that a damage remedy was available to Ms. Davis.

In ruling that Federal courts lack power to award damages in Fifth Amendment equality cases, the en banc majority seriously misapprehended the remedial powers - and duties - of Article III courts in constitutional cases properly within their subject matter jurisdiction. Amicus believes that whenever a plaintiff invokes a provision of the Federal constitution amenable to private enforcement in a case or controversy properly within the subject matter jurisdiction of an Article III court, the traditional judicial remedies of prohibitory injunction and compensatory damages are presumptively available to the Article III court to enable it to carry out obligations imposed upon the judiciary by Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). E.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Jacobs v. United States, 290 U.S. 13 (1933); Ex parte Young, 209 U.S. 123 (1908). See generally, Dellinger, "Of Rights and Remedies": The Constitution as Sword, 85 Harv.L.Rev. 1532 (1972); Hill, Constitutional Remedies, 69 Colum.L.Rev. 1169 (1969); Katz, The Jurisprudence of Remedies, 117 U. Pa.L.Rev. 1 (1968). Moreover, where, as here, a compensatory damage award is the only remedial device capable of vindicating plaintiff's constitutional rights, Article III courts of competent jurisdiction possess inherent

power to invoke the necessary remedy, even in the face of countervailing Congressional intent. Jacobs v. United States, 290 U.S. 13 (1933).[11]

The en banc majority found it unnecessay to rule on the unique separation of power concerns raised by Ms. Davis' complaint. Should this Court agree that the en banc majority was in error concerning the general availability of damage awards in Fifth Amendment equality cases, amicus suggests that the separation of powers issue be remanded to the Fifth Circuit for initial consideration, just as a similar executive immunity issue was remanded in Bivens. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), on remand, 456 F.2d 1339 (2d Cir. Cir. 1972). If, however, this Court elects to consider the separation of powers issue, amicus urges the Court to reject Rep. Passman's Article I, §6 position, since the

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11/ Where more than one remedy is capable of vindicating a constitutional right, amicus agrees that a Congressional judgment as to which remedy should be utilized is entitled to substantial deference. Brown v. General Services Administration, 425 U.S. 820 (1976). In both Bivens and in the instant case, however, no Congressionally sanctioned alternative remedy exists and and a damage award is the only remedy capable of vindicating plaintiff's constitutional rights.

employment of ministerial staff is not core legislative activity within the meaning of Gravel v. United States, 408 U.S. 606 (1972).[12/] Moreover, while Federal courts, as a general matter of separation of powers, should be cautious about interfering with the hiring or firing of policy-making aides to members of Congress, no similar constraint exists in the area of ministerial employees.

12/ See, e.g., Elrod v. Burns, 427 U.S. 347 (1976); see generally Coven, The First Amendment Rights of Policy-Making Employees, 12 Harv. Civ. Rts.-Civ. Lib. Rev. 559 (1977).

I. FEDERAL DISTRICT COURTS POSSESS INHERENT POWER TO INVOKE TRADITIONAL JUDICIAL REMEDIES - INCLUDING AWARDS OF COMPENSATORY DAMAGES - WHEN NECESSARY OR APPROPRIATE TO RESOLVE CLAIMS ARISING UNDER THE GUARANTEE OF EQUAL TREATMENT CONTAINED IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT. WHILE, ORDINARILY, SUCH INHERENT REMEDIAL POWER OUGHT NOT BE EXERCISED IN THE FACE OF CONGRESSIONAL DISAPPROVAL, IF CONGRESS HAS FAILED TO PROVIDE A REASONABLY EFFECTIVE ALTERNATIVE REMEDY, FEDERAL COURTS MUST PROVIDE REMEDIES SUFFICIENT TO RESOLVE CONSTITUTIONAL CASES FALLING WITHIN THEIR SUBJECT MATTER JURISDICTION.

Introduction

A generation of law students has grappled with the Hart Dialogue in an effort to explore the nature of Federal judicial protection of constitutional rights. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart & Wechsler's The Federal Courts and the Federal System (2d Ed.) at 330-360. What, Professor Hart asked, would happen if Congress provided that one or more substantive provisions of the Constitution, otherwise appropriate for judicial enforcement, were no longer cognizable in Federal court?

To many, the Dialogue, for all its brilliance, appeared highly artificial since, given the unspoken assumptions of our current political structure, Congressional assault on the role of the Federal judiciary as ultimate guardians of our constitutional rights seemed highly improbable. Thus, although legislative threats to curb the constituitonal jurisdiction of the Federal courts have abounded, no jurisdiction-curbing provision has actually become law in recent years. See generally, Pritchett, Congress Versus the Supreme Court 1957-1960 (1961); Elliott, Court Curbing Proposals in Congress, 33 Notre Dame Lawyer 597 (1958); McKay, Court, Congress and Reapportionment, 63 Mich.L. Rev. 255 (1964). Unfortunately, in ruling that a Federal District Court is powerless to award compensatory damages in Fifth Amendment equality cases because Congress has not authorized the remedy, the Fifth Circuit has re-opened the spectre of constitutional rights without remedies. And it has done so, not in response to a Congressional attempt to abolish remedies, compare Ex parte McCardle, 7 Wall 506 (186) but wholly on its own motion, without any Congressional direction whatever. If, as the en banc majority suggests, Congress

may strip an Article III court of the power to invoke traditional judicial remedies necessary for the effectuation of a decision on the merits of a constitutional case properly within its jurisdiction, effective judicial protection of constitutional rights exists solely at the sufferance of Congress. But this is not the law. The decisions of this Court and the remedial tradition of the Federal judiciary compel the conclusion that a Federal District Court retains discretion to utilize traditional remedies - including compensatory damages - whenever they are deemed necessary to effectuate a decision on the merits of a constitutional case properly within its subject matter jurisdiction. 13/

13/ Given the existence of §1331(a) jurisdiction, this case does not pose the most difficult issue posed by the Hart Dialogue - the impact of Congressional withdrawal of subject matter jurisdiction on a court's ability to enforce constitutional rights.

A. The Duty of a Federal Court to Adjudicate a Constitutional Case Within Its Subject Matter Jurisdiction

The essence of the power of an Article III court to adjudicate the constitutionality of the acts of coordinate branches turns on its duty to resolve cases or controversies by deciding which of two conflicting sources of legal right must be awarded precedence. Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803); United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring). Without the capacity to provide effective relief to the litigants before the Court, however, the theory of Marbury is undermined. Cf. Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). Since the Court's initial power to resolve the merits flows, under Marbury, from a court's responsibility to service litigants seeking the resolution of a given case or controversy, and since Congress has directed the Court to entertain the case or controversy by vesting the Court with subject matter jurisdiction, failure to provide a necessary remedy strikes at the heart of the judicial function and cannot be reconciled with Chief Justice Marshall's

interpretation of judicial power and responsibility. Once Congress directs an Article III court to assume jurisdiction over a constitutional case - thus triggering a classic Marbury confrontation - neither Congress, nor the Court, may decline to utilize traditional judicial remedies which are necessary to effectuate a decision on the merits. Jacobs v. United States, 290 U.S. 13 (1933). Separation of powers is a two-way street. Just as it cautions against judicial interference in the legislative sphere (see infra at 30-35), so it insulates the judicial sphere from legislative encroachment. The decision of the en banc majority to "defer" to the legislature by declining to afford a plaintiff the only remedy capable of vindicating her constitutional claim is an abdication of the Court's Article III responsibilities.14/

14/ Amicus suggests that the clearly erroneous attempt of the en banc majority to couch its dismissal in jurisdictional terms is an attempt to avoid the logic of Marbury. Only if the en banc majority can avoid being vested with subject matter jurisdiction can it justify withholding the only effective remedy.

B. Federal Courts and the Exercise of Traditional Remedial Powers in Constitutional Cases

Prior to the grant of Federal question jurisdiction in 1875, Federal courts had little or no occasion to speculate on their duty to provide remedies in constitutional cases properly within their subject matter jurisdiction. However, even before the adoption of the Constitution, common law courts had traditionally utilized compensatory damage awards to vindicate interests which we now regard as constitutionally protected. E.g., Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703); Entick v. Carrington, 19 Howell St. Tr. 1029 (1765). The enactment of general federal question jurisdiction in 1875, coupled with an expansive reading of the term "person" in the Fourteench Amendment to include business corporations, precipitated a barrage of Federal litigation seeking to enforce substantive due process claims against government regulatory bodies. This Court routinely appoved requests for equitable relief in such cases, basing jurisdiction on the predecessor to 28 U.S.C. §1331(a) and the power to grant equitable relief directly on Section 1 of the Fourteenth Amendment.

E.g., Ex parte Young, 209 U.S. 123 (1908).[15/] See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Brown v. GSA, supra, 425 U.S. at 826. The tradition of routinely utilizing equitable remedies in constitutional cases in the absence of Congeessional authorization is now so entrenched that even the en banc majority assumed that injunctive relief would have been available in this case were Representative Passman currently a member of Congress. Moreover, in the years following the establishment of Federal question jurisdiction, this Court approved the utilization of compensatory damage awards by Federal District Courts in constitutional cases in the absence of explicit Congressional authorization on at least two occasions. Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487

15/ Modern analysis would view the cause of action for equitable relief in Ex parte Young, 209 U.S. 123 (1908), as based on 42 U.S.C. §1983. However, at the time Ex parte Young was decided, the Civil Rights Act of 1871 was not deemed to apply to property rights. E.g., Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900).

(1902). In addition, in Jacobs v. United States, 290 U.S. 13 (1933), this Court suggested that the remedial power of Federal courts in constitutional cases was beyond the reach of Congress. Finally, the Federal courts have developed a tradition of utilizing both equitable relief and compensatory damages to enforce statutory rights in the absence of explicit Congressional authorization. E.g., J. I. Case & Co. v. Borak, 377 U.S. 426 (1964).[16/] Thus, prior to 1971, this Court had repeatedly approved a broad inherent power in the Federal district courts to invoke

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16/ Two significant differences exist in deciding whether to utilize traditional remedies in a statutory as opposed to a constitutional case. First, in a statutory case, a Federal court must often make a threshold determination whether the statutory rights are intended to be privately enforceable at all. E.g., Cort v. Ash, 422 U.S. 66 (1975). In the vast bulk of constitutional cases, it is assumed that constitutional rights create privately enforceable causes of action. Second, in a statutory case, the overriding issue is whether the use of a given remedy would contravene Congressional intent, since the substantive rights are themselves created and defined by Congress. In a constitutional case, however, the subtantive rights transcend the intent of Congress.

traditional judicial remedies if necessary and appropriate to the vindication of both statutory and constitutional rights. In Bivens v. Six Unknown Agents, supra, this Court unequivocally reiterated the view that Federal courts may utilize compensatory damages to vindicate constitutional rights in cases within their subject matter jurisdiction. In Bivens, Mr. Justice Brennan, writing for the Court, ruled that Webster Bivens' claim for damages caused by an allegedly unconstitutional search and seizure arose under the Fourth Amendment rather than state tort law. Accordingly, he ruled that Bivens' claim was properly cognizable under § 1331(a). Once Bivens' Fourth Amendment claim was seen to fall within the "arising under" subject matter jurisdiction of the District Court, Mr. Justice Brennan, writing for the Court, held that Federal judges possessed the inherent remedial power to invoke traditional remedies, including damages, needed to vindicate the constitutional right at stake. Mr. Justice Harlan, in concurrence, followed a similar line of reasoning in discussing the factors which should instruct District Judges whether to exercise their inherent remedial powers. It is, amicus believes, a fair reading of

both Mr. Justice Brennan's majority opinion and Mr. Justice Harlan's concurrence that once subject matter jurisdiction over an otherwise justiciable constitutional case or controversy is found to exist, Federal district courts are presumptively armed with the traditional judicial remedies of prohibitory injunction and compensatory relief to effectuate their decisions on the merits. Of course, as both Mr. Justice Brennan and Mr. Justice Harlan noted, the presumptive availability of a damage remedy to vindicate a constitutional right may be rebutted under two narrowly circumscribed circumstances.

First, Congress may have prescribed a remedial scheme which is inconsistent with an award of damages, but which appears to provide a reasonable opportunity to the plaintiff to vindicate his or her constitutional rights. Brown v. General Services Administration, 425 U.S. 820 (1976). Amicus agrees that when Congress has determined that one of two alternative methods of constitutional enforcement is preferable, Federal courts should exercise caution in rejecting the remedial judgment of Congress. However, as Mr. Justice Brennan and Mr. Justice Harlan were careful to note, the Congressional alternative must afford a

plaintiff in a constitutional case a reasonable opportunity to vindicate his or her rights.[17/] Where, as here, Congress has provided no alternative remedy and where it is conceded that damages are the sole remedial device capable of vindicating petitioner's Fifth Amendment rights, the traditional remedial power of the Federal court cannot be trumped by Congressional failure to provide for a damage award. Jacobs v. United States, 290 U.S. 13 (1933).

Second, the nature of the substantive right at stake may be inappopriate for enforcement by a given private remedy. Certain rare constitutional provisions, such as the Article I, Section 9 ban on titles of nobility, may not be amenable to private enforcement at all;[18/] while certain other

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17/ In Bivens, Mr. Justice Harlan took pains to demonstrate that the alternative Fourth Amendment remedies of the exclusionary rule and injunctive relief would not vindicate Bivens' rights. 403 U.S. at 409-410. In the instant case, it is conceded that no alternative remedy is available to Ms. Davis.

18/ The decision as to whether a given constitutional provision is amenable to private enforcement is often expressed as a standing question. Compare Flast v. Cohen, 392 U.S. 83 (1968), with United States v. Richardson, 418 U.S. 166 (1974). Such a decision is not, strictly speaking, a decision on remedies, but rather is a decision on the scope of

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constitutional provisions, although privately enforceable, may not lend themselves to a damage remedy. Thus, Mr. Justice Harlan suggested, difficulty in ascertaining judicially manageable standards to test causation and measure the quantum of damages would argue against the recognition of a damage remedy in a certain constitutional case. In Bivens, the Fourth Amendment was correctly perceived as conferring judicially enforceable rights of private parties, and the experience of the common law courts in administering analogous compensatory damage remedies was perceived as easing problems of causation and valuation. In the instant case, the guarantee of equal treatment invoked by Ms. Davis is a quintessentially private right. Moreover, the causation and valuation issues raised by a claim in back pay are trivial compared with the issues previously deemed manageable in Bivens. Thus, neither of the principal factors which would caution against the recognition of a damage claim are present in Fifth Amendment equality cases.

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the substantive provision involved. Although such a decision is relatively rare in a constitutional context, it is routine in deciding whether to imply a private damage action in statutory cases. Compare J. I. Case & Co. v. Borak, 377 U.S. 426 (1964), with Cort v. Ash, 422 U.S. 66 (1975).

Nor are the subsidiary factors of caseload or federalism discussed in Bivens and by the en banc majority below either present or persuasive. The recognition of a damage remedy in Fifth Amendment equality cases will not substantially affect the caseload of the Federal courts since, to the extent the Fifth Amendment claims are brought as common law tort or contract claims in state court, they are subject to removal and will be heard in Federal court in any event. 28 U.S.C. §1442(a)(1). Moreover, the fact that a Federal injunctive remedy is available means that the vast bulk of Fifth Amendment equality suits will continue to be brought in Federal court seeking injunctive relief, whether or not a damage remedy is also available.[19/] Finally, it is, to say the least, questionable practice to deny constitutional litigants access to a remedy necessary to vindicate their constitutional rights

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19/ Indeed, failure to afford a Federal damage remedy will exacerbate the caseload problem by encouraging a bi-furcation of the case into a Federal action for injunctive relief and a state action for damages, which will ultimately find its way to Federal court via §1442(a)(1) removal.

because too many constitutional claims may exist.[20/] As a second subsidiary argument against recognizing a damage remedy, the en banc majority launches a curious federalism argument which suggests that it is more appropriate for Federal officials who have unconstitutionally injured persons while acting under color of Federal law to be sued in state, rather than Federal, court. Of course, given removal jurisdiction, even if the en banc majority were successful in forcing Federal constitutional claims against Federal officials into state court in the first instance, the claims would inevitably make their way into Federal court. 28 U.S.C. §1442(a)(1). Moreover, apart from a blind and unexplained preference for state court adjudication, it is unclear what federalism values would be served by asking state judges to sit in judgment of Federal officials who are alleged

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20/ The floodgate argument marshalled by by en banc majority is, in large part, a self-inflicted prophecy which flows from its insistence on viewing the Due Process Clause as an indivisible unit. If one lumps procedural due process, substantive due process and Fifth Amendment equality into a single mass, as does the en banc majority, it is easier to speculate about floodgates. If, however, one focusses solely on Fifth Amendment equality claims, the volume of cases involved is far smaller.

to be acting in violation of the Federal constitution.

Thus, when one compares the Fourth Amendment claim advanced in Bivens with the equality-based Fifth Amendment claim advanced by Ms. Davis in this case, no principled basis exists for permitting Federal courts to grant damages in a Fourth Amendment context, but forbidding them from granting damages in a Fifth Amendment equality case.

C. The Exercise By the Lower Federal Courts of Remedial Power to Award Compensatory Damages in Constitutional Cases in the Wake of Bivens.

Amicus has argued that the implications of Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) and the decisions of this Court[21/] compel the conclusion that the Federal courts are presumptively empowered to award compensatory damages in constitutional cases falling within their subject matter jurisdiction. In the wake of Bivens v. Six Unknown Agents, supra, the lower

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21/ Ex parte Young, 209 U.S. 123 (1908); Jacobs v. United States, 290 U.S. 13 (1933); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

Federal courts have consistently recognized the existence of such presumptive remedial authority. See generally, Lehmann, Bivens and its Progeny, 4 Hastings Const. L. Q. 531 (1977) and the cases collected there at 571 F.2d 807, n. 6. Thus, whether a constitutional plaintiff has asserted a claim under the First Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment, the Thirteenth Amendment, or the Fourteenth Amendment, the lower Federal courts have consistently recognized a presumptive power to award damages in constitutional cases within their subject matter jurisdiction.[22/] Indeed, the only circumstances in which the presumptive availability of a damage remedy has been rebutted have been those situations where Congress has acted to provide an alternative, equally effective, remedial structure. E.g., Brown v. General Services Administration, 425 U.S. 820 (1976); Kostka v. Hogg, 560 F.2d 37 (1st Cir.

22/ For a compilation of post-Bivens lower court decisions concerning remedies in causes of action founded directly upon violations of constitutional rights, see Appendix, infra, at 37-42.

1977); McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977); Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977). In the absence of Congressionally created alternative, and equally effective, remedies, however, Federal courts, with the unfortunate exception of the en banc majority below, have systematically exercised their presumptive remedial power to award compensatory damages in constitutional cases.

II. SINCE THE EN BANC MAJORITY FAILED TO ADDRESS THE UNIQUE SEPARATION OF POWERS ISSUES POSED BY AN EXERCISE OF INHERENT REMEDIAL POWER TO AWARD DAMAGES AGAINST A MEMBER OF CONGRESS FOR HAVING ENGAGED IN UNCONSTITUTIONAL HIRING PRACTICES, THIS COURT SHOULD REMAND THE ISSUE FOR INITIAL CONSIDERATION. IF THE COURT ELECTS TO CONSIDER THE SEPARATION OF POWERS ISSUE, IT SHOULD A) RULE THAT A DAMAGE AWARD IS NOT BARRED BY THE SPEECH OR DEBATE CLAUSE, AND B) REMAND FOR A FACTUAL HEARING ON THE PRECISE NATURE OF MS. DAVIS' JOB TO DETERMINE WHETHER GENERALIZED NOTIONS OF SEPARATION OF POWERS SHOULD PRECLUDE JUDICIAL REVIEW OF REP. PASSMAN'S ACTIONS.

As amicus has argued, Federal courts possess a presumptive general remedial power to award damages against Federal defendants who have violated the guarantee of equal treatment contained in the Fifth Amendment. Thus, were Rep. Passman an official of the Department of Agriculture charged with racially discriminatory activity, no serious obstacle would exist to

an award of compensatory damages.[23] However, a decision to invoke a damage remedy against a member of Congress arising out of allegedly unconstitutional staff employment policies raises unique and delicate separation of powers concerns. Given its view that no damage remedy exists in a Fifth Amendment equality case, the en banc majority failed to address explicitly the unique separation of powers issues posed by Ms. Davis' complaint.[24] Accordingly, if this Court agrees that, as a general matter, a damage remedy would be available in a Fifth Amendment equality case, it should remand to the Fifth Circuit for initial consideration of the legislative "immunity" issue, just as it remanded

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23/ Assuming that Congress had not established an alternative set of remedies equally effective in vindicating plaintiff's Fifth Amendment rights. See supra at 22-23.

24/ Both the majority and dissent of the initial panel considered the issue. 544 F.2d 865, 877-881, 882 (5th Cir. 1977). En banc, Judge Jones re-stated his separation of powers position and concurred with the en banc majority. Judges Goldberg and Brown, in dissent, simply referred to their initial panel opinion.

a similar executive "immunity" issue to the Second Circuit in Bivens. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), on remand 456 F.2d 1339 (2d Cir. (1972).

If, however, this Court chooses to consider whether Congressman Passman's status blocks the assertion of a damage remedy, amicus urges the Court to recognize, first, that discriminatory employment practices are not insulated from judicial review by the "speech or debate" clause and, second, that where ministerial, non-policy-making jobs are at issue, no generalized principle of separation of powers precludes judicial enforcement of the Fifth Amendment against Congressmen. As Powell v. McCormack, 395 U.S. 486 (1969) and Bond v. Floyd, 385 U.S. 116 (1966) illustrate, neither Article I, § 6, nor generalized notions of separation of powers and legislative immunity preclude the Federal judiciary from the vigorous enforcement of constitutional rights.

Prior to 1972, the speech or debate clause was often perceived as granting a "personal" immunity to members of Congress which insulated them from judicial

scrutiny.[25] However, in United States v. Brewster, 408 U.S. 501 (1972) and Gravel v. United States, 408 U.S. 606 (1972), this Court re-interpreted the speech or debate immunity to be "functional" rather than "personal." As a functional immunity, it protects both a Congressman and his staff so long as they are engaged in core legislative activity, but it excludes even a Congressman himself when his activities fall outside core legislative activity. This Court has ruled that the "functional" speech or debate privilege does not insulate a member of Congress from judicial review of (a) contacts with the executive

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25/ The speech or debate clause has been before this Court on nine occasions. Kilbourn v. Thompson, 103 U.S. 168 (1880); Tenney v. Brandhove, 341 U.S. 367 (1951)(state legislators enjoy an analogous common law immunity); United States v. Johnson, 383 U.S. 169 (1966); Dombrowski v. Eastland, 387 U.S. 28 (1967); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1912); Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); and Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). See also, McAdams v. McSurely, No. 76-1621, June 26, 1978 (cert. dismissed); United States v. Helstoski, No. 78-349 (cert. granted, Dec. 11, 1978).

branch on behalf of constituents;[26] (b) public distribution of Congressional reports;[27] and (c) the private republication of material assembled by members of Congress or their aides.[28] Similarly, employment decisions involving ministerial staff positions do not involve a member of Congress in core legislative activity and, thus, are not insulated from judicial scrutiny by the speech or debate clause.

Similarly, generalized notions of separation of powers should not inhibit a Federal court from invoking its general remedial powers to award damages against Rep. Passman, if he is found liable on the merits. So long as the employment decision involved was made in connection with a ministerial, non-policy-making position, Rep. Passman's interests in

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26/ United States v. Brewster, 408 U.S. 501 (1972).

27/ Doe v. McMillan, 412 U.S. 306 (1973).

28/ Gravel v. United States, 408 U.S. 606 (1972).

avoiding judicial review are no different from those of any Federal official. Only when the job at issue affects his performance as a legislator in a policy-making sense can Rep. Passman's legislative, as opposed to bureaucratic, interests be said to be affected. It is, of course, impossible at this stage of the litigation to know whether Ms. Davis' job was ministerial or policy-making. Thus, the matter should be remanded for trial.

CONCLUSION

The judgment of th en banc majority of the Fifth Circuit should be reversed and the case remanded to the Fifth Circuit for initial consideration of the unique separation of powers issue posed by this case. In the alternative, the judgment of the en banc majority of the Fifth Circuit should be reversed and the matter remanded to the District Court for trial on the merits.

Dated: New York, New York
December 14, 1978

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A P P E N D I X

Cases Concerning Compensatory Remedies for Violations of Constitutional Rights

A. First Amendment cases implying damages remedy include:

Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir.);

Paton v. LaPrade, 524 F.2d 862, 869-70 (3rd Cir. 1975);

Yiamouyiamis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975);

Gray v. Union County-Intermed. Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975) (§1331 jurisdiction upheld);

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), vacated on other grounds, 421 U.S. 983 (1975) (§1331 jurisdiction upheld);

Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064, 1088 (C.D. Cal. 1976);

Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976);

Jihaad v. Carlson, 410 F.Supp. 1132, 1133 (E.D. Mich. 1976);

Butler v. United States, 365 F.Supp. 1035 (D. Haw. 1973);

Revis v. Laird, 391 F.Supp. 1133 (E.D. Cal. 1975).

But see,

Neeley v. Blumenthal, ___ F.Supp. ___ (D.D.C. 1978) (slip opinion, July 6, 1978);

Schofield v. County of Volusia, Fla., 413 F.Supp. 908 (M.D. Fla. 1976);

Moore v. Schlesinger, 384 F.Supp. 163 (D. Colo. 1974);

Smothers v. CBS, 351 F.Supp. 622 (C.D. Cal. 1972).

B. Fifth Amendment cases implying damages remedy include:

Loe v. Armstead, 582 F.2d 129 (4th Cir. 1978);

Green v. Carlson, 581 F.2d 669 (7th Cir. 1978) (implicit sanction of damages cause of action);

Bennett v. Campbell, 564 F.2d 329, 332 (9th Cir. 1977);

Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977) (implicit sanction of cause of action for damages);

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977);

Lewis v. D. C. Department of Correction, 533 F.2d 710 (D.C. Cir. 1976) (implicit);

Dry Creek Lodge v. United States, 515 F.2d 926, 933 and n. 5 (10th Cir. 1975);

Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974) (implicit);

States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974);

Sullivan v. Murphy, 478 F.2d 938, 963 (D.C. Cir. 1973);

United States ex rel Moore v. Koelzer, 457 F.2d 893 (3rd Cir. 1972);

Bethea v. Reid, 445 F.2d 1163, 1165 (3rd Cir. 1971) (implicit);

McKenzie v. Calloway, 456 F.Supp. 590, 595 (E.D. Mich. 1978);

Christie v. Marston, 451 F.Supp. 1142 (N.D. Ill. (1978);

De Malherbe v. International U. of Elev. Constructors, 449 F.Supp. 1335 (N.D. Cal. 1978) (implicit);

Fayerweather v. Gell, 447 F.Supp. 913 (M.D. Pa. 1978);

Lofland v. Meyers, 442 F.Supp. 955 (S.D.N.Y. 1977);

Hill v. McMartin, 432 F.Supp. 99 (E.D. Mich. 1977);

Eisenberg v. Matthews, 420 F.Supp. 1274 (E.D. Pa. 1976) (semble);

Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975);

Blassingame v. United States Attorney General, 387 F.Supp. 418 (S.D.N.Y. 1975);

Revis v. Laird, 391 F.Supp. 1133, 1338-39 (E.D. Cal. 1975);

Shaffer v. Wilson, 383 F.Supp. 554 (D. Colo. 1974);

United States ex. rel. Harrison v. Place, 380 F.Supp. 107 (E.D. Pa. 1974);

Butler v. United States, 365 F.Supp. 1035 (D. Haw. 1973);

James v. United States, 358 F.Supp. 1381, 1386-87 (D.R.I. 1973) (dicta);

Johnson v. Aldredge, 349 F.Supp. 120 (M.D. Pa. 1972) (upholding §1331 jurisdiction).

But see,

Hernandez v. Lattimore, 454 F.Supp. 163 (S.D.N.Y. 1978);

Jones v. United States, 401 F.Supp. 168 (E.D. Ark);

Archuleta v. Calloway, 385 F.Supp. 384 (D. Colo. 1974);

Davidson v. Kane, 337 F.Supp. 922 (E.D. Va. 1972) (dictum).

C. Sixth Amendment cases implying damages remedy include:

Berling Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

D. Eighth Amendment cases implying damages remedy include:

Green v. Carlson, 581 F.2d 669 (7th Cir. 1978);

Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975);

Blassingame v. United States Attorney General, 387 F.supp. 418 (S.D.N.Y. 1975);

Waltenberg v. New York City Department of Correction, 376 F.Supp. 41 (S.D.N.Y. 1974) (semble);

Walker v. McCune, 363 F.Supp. 254 (E.D. Va. 1973) (semble);

James v. United States, 358 F.Supp. 1381 (D.R.I. 1973).

But see,

Hernandez v. Lattimore, 454 F.Supp. 765 (S.D.N.Y. 1978) (FTCA was alternate remedy).

E. Thirteenth Amendment cases implying damages remedy include:

Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975);

Maybanks v. Ingraham, 378 F.Supp. 913 (E.D. Pa. 1974).

F. Fourteenth Amendment cases implying damages remedy include:

Jones v. City of Memphis, ___ F.2d ___ (6th Cir. 1978) (slip opinion Sept. 19, 1978);

Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978);

Pitrone v. Mercadante, 572 F.2d 98 (3rd Cir. 1978) (§1331 jurisdiction upheld);

Gagliardi v. Flint, 564 F.2d 112 (3rd Cir. 1977) (§1331 jurisdiction upheld);

Owen v. City of Independence Missouri, 560 F.2d 925, 933 (8th Cir. 1977) (upholds §1331 jurisdiction but only grants equitable remedy);

Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975);

Fitzgerald v. Porter Mem. Hospital, 523 F.2d 716, 718-19 n. 7 (7th Cir. 1975) (implicit sanction of damages remedy);

Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975)(dicta);

Sands v. Union County, Tenn., 455 F.Supp. 738, 740 (E.D. Tenn. 1978);

Miller v. Board of Education of City of Lincoln, 450 F.Supp. 106 (S.D. W.Va. 1978) (but granting only equitable relief);

Murray v. Murphy, 441 F.Supp. 120 (E.D. Pa. 1977);

Newborn v. Morrison, 440 F.Supp. 623 (S.D. Ill. 1977) (§1331 jurisdiction upheld);

Sedule v. Capitol School District, 425 F.Supp. 552 (D. Del. 1976) (§1331 juris. upheld);

Sanabria v. Village of Monticello, 424 F.Supp. 402 (S.D.N.Y. 1976);

6th Camden Corp. v. Evesham Tp., Burlington Cty. 420 F.Supp. 709 (D.N.J. 1976);

Behan v. City of Dover, 419 F.Supp. 562 (D. Del. 1976);

Sheets v. Stanley Community School District No. 2, 413 F.Supp. 350 (D.N. Da. 1975);

Collum v. Yurkovich, 409 F.Supp. 557 (N.D. Ill. 1975) (upholding §1331 jurisdiction);

Panzarella v. Boyle, 406 F.Supp. 787 (D.R.I. 1975);

Williams. v Brown, 398 F.Supp. 155 (N.D. Ill. 1975);

Maybanks v. Ingraham, 378 F.Supp. 913 (E.D. Pa. 1974);

Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974) (upholding §1331 juris.);

Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) (unlawful taking of property).

But see,

Perzanowski v. Salvio, 369 F.Supp. 223 (D. Conn. 1974);

Cale v. Covington, ___ F.2d ___ (4th Cir. 1978) (slip opinion, November 3, 1978);

Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978);

Washington v. Brantley, 352 F.Supp. 559 (M.D. Fla. 1972);

Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977).

G. Cases implying Bivens-type of action for the violation of "any constitutional right" include:

Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) (dicta);

Adekav v. New York City, 431 F.Supp. 812 (S D.N.Y. 1977);

Gardels v. Murphy, 377 F.Supp. 1389, 1398 (N.D. Ill. 1974);

Rodriguez v. Barcelo, 358 F.Supp. 43, 48 (D.P.R. 1973) (dictum);

Saffron v. Wilson, 70 F.R.D. 51 (D.D.C. 1975).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS, *Petitioner*,

v.

OTTO E. PASSMAN, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF
THE HONORABLE MORRIS UDALL, THE HONORABLE PATRICIA SCHROEDER, THE HONORABLE CHARLES ROSE, WINNIE BURRELL, CARLA KISH, BRUCE KRIEGMAN, THE HONORABLE LES AUCOIN, THE HONORABLE BERKLEY BEDELL, THE HONORABLE DAVID E. BONIOR, THE HONORABLE WILLIAM M. BRODHEAD, THE HONORABLE GEORGE E. BROWN, JR., THE HONORABLE JOHN H. BUCHANAN, JR., THE HONORABLE YVONNE BRATHWAITE BURKE, THE HONORABLE ROBERT CARR, THE HONORABLE JOHN CONYERS, THE HONORABLE RONALD V. DELLUMS, THE HONORABLE THOMAS DOWNEY, THE HONORABLE ROBERT F. DRINAN, THE HONORABLE DON EDWARDS, THE HONORABLE DANTE B. FASCELL, THE HONORABLE DALE E. KILDEE, THE HONORABLE WILLIAM LEHMAN, THE HONORABLE EDWARD J. MARKEY, THE HONORABLE GEORGE MILLER, THE HONORABLE ANTHONY MOFFETT, THE HONORABLE RICHARD NOLAN, THE HONORABLE LEON PANETTA, THE HONORABLE DON J. PEASE, THE HONORABLE FRED RICHMOND, THE HONORABLE BRUCE F. VENTO, THE HONORABLE HAROLD L. VOLKMER, AND THE HONORABLE TED WEISS,
AMICI CURIAE, IN SUPPORT OF REVERSAL

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IN THE

Supreme Court of the United States

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No. 78-5072

SHIRLEY DAVIS, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE HONORABLE MORRIS UDALL, THE HONORABLE PATRICIA SCHROEDER, THE HONORABLE CHARLES ROSE, WINNIE BURRELL, CARLA KISH, BRUCE KRIEGMAN, THE HONORABLE LES AUCOIN, THE HONORABLE BERKLEY BEDELL, THE HONORABLE DAVID E. BONIOR, THE HONORABLE WILLIAM M. BRODHEAD, THE HONORABLE GEORGE E. BROWN, JR., THE HONORABLE JOHN H. BUCHANAN, JR., THE HONORABLE YVONNE BRATHWAITE BURKE, THE HONORABLE ROBERT CARR, THE HONORABLE JOHN CONYERS, THE HONORABLE RONALD V. DELLUMS, THE HONORABLE THOMAS DOWNEY, THE HONORABLE ROBERT F. DRINAN, THE HONORABLE DON EDWARDS, THE HONORABLE DANTE B. FASCELL, THE HONORABLE DALE E. KILDEE, THE HONORABLE WILLIAM LEHMAN, THE HONORABLE EDWARD J. MARKEY, THE HONORABLE GEORGE MILLER, THE HONORABLE ANTHONY MOFFETT, THE HONORABLE RICHARD NOLAN, THE HONORABLE LEON PANETTA, THE HONORABLE DON J. PEASE, THE HONORABLE FRED RICHMOND, THE HONORABLE BRUCE F. VENTO, THE HONORABLE HAROLD L. VOLKMER, AND THE HONORABLE TED WEISS,

AMICI CURIAE, IN SUPPORT OF REVERSAL

Twenty-nine Members and three employees of the United States House of Representatives submit this brief as *amici curiae* in support of petitioner's claim that the en banc decision of the United States Court of Appeals for the Fifth Circuit, entered on April 18, 1978, should be reversed. Both parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(b) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk and are appended to this brief.

STATEMENT OF THE CASE

Petitioner served from February 1, 1974 through July 31, 1974 as the Deputy Administrative Assistant to respondent, who was then a member of the House of Representatives. Respondent terminated petitioner's employment, explaining in a letter that "it was essential that the understudy to [his] Administrative Assistant be a man." (A. 6-7)

Petitioner filed suit in the United States District Court for the Western District of Louisiana, alleging sex discrimination in violation of the fifth amendment to the United States Constitution. The district court, in an unreported decision, dismissed the suit on the grounds that respondent's action did not violate the fifth amendment and that petitioner did not have a private right of action. The district court held, however, that petitioner's suit was not barred by immunity doctrines. (A. 9-10)

A panel of the United States Court of Appeals for the Fifth Circuit reversed the dismissal of petitioner's suit. The panel held that petitioner had alleged a constitutional violation, that she had a private right of action, and that no doctrine of immunity prohibited

petitioner from filing her suit. *Davis* v. *Passman*, 544 F.2d 865 (5th Cir. 1977).

The Fifth Circuit, sitting en banc, reheard the case and reversed the panel's decision. The en banc decision reasoned that the private right of action for violations of fourth amendment rights, recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), did not extend to petitioner's action under the fifth amendment. The court did not address the immunity issue or whether the conduct complained of violated the fifth amendment. *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978).

Petitioner's request for a writ of certiorari from this Court was granted on October 30, 1978.

A more complete statement of the case may be found in the petition for certiorari.

QUESTIONS PRESENTED

1. Does the failure of Congress to adopt congressional fair employment procedures preclude normal judicial relief for constitutional violations?

2. Does the speech or debate clause of the United States Constitution immunize a Member of Congress from suit for the firing of an employee on the basis of sex?

INTEREST OF THE AMICI

Amici are Members and employees of the United States House of Representatives. Three of the Members—the Honorable Morris Udall, the Honorable Patricia Schroeder, and the Honorable Charles Rose—and the three congressional employees comprise the House Fair Employment Practices Committee. That

Committee administers the House Fair Employment Practices Agreement, a voluntary agreement signed by 109 Members of the House not to discriminate in employment on the basis of race, color, religion, sex, national origin, age, parental or marital status, or handicap.

All of the *amici* have a strong interest in assuring the existence of fair employment practices for congressional employees. *Amici* are deeply concerned about the adverse impact on such practices that would result if the Fifth Circuit's en banc decision were permitted to stand.

This brief will be limited to those matters, raised by respondent, which are of special interest to *amici,* as Members of Congress and congressional employees: congressional failure to provide an alternative to—or to foreclose—the normally available remedies for constitutional violations, and the inapplicability of speech or debate immunity to sex discrimination in employment.

ARGUMENT

I. CONGRESSIONAL FAILURE TO ADOPT INTERNAL FAIR EMPLOYMENT PROCEDURES DOES NOT PRECLUDE NORMALLY AVAILABLE JUDICIAL RELIEF.

A. The Fair Employment Issue in Congress

Respondent has asserted that Congress is acting to remedy its employment discrimination problems,[1] and that judicial relief is therefore inappropriate. Although there have been a few recent attempts in Congress to establish an effective internal mechanism for handling congressional employees' discrimination complaints,[2] they have been inadequate and unsuccessful. The judicial relief sought by petitioner is the only relief available to vindicate her constitutional rights.

In the last two years there have been three congressional efforts to establish a mechanism to resolve discrimination claims of congressional employees in a manner which would govern all Members.[3] In none of these cases was full consideration on the merits given to the fair employment proposals.

[1] Respondent has claimed that "Congress is moving rapidly toward providing its own remedies" (Resp. at 7) and that "Congress is solving whatever employee relations problems may exist within its halls" (Supp. Resp. at 2). These claims were not raised as a mootness argument and will not be so addressed here.

1. House of Representatives

In September, 1977, the House of Representatives' Commission on Administrative Review (the "Obey Commission") issued a report and a resolution proposing changes in the administrative structure and operations of the House. Commission on Administrative Review, 95th Cong., 1st Sess., Recommendations and Rationales Concerning Administrative Units and Work Management (Including House Resolution 766)

[2] Such attempts have been prompted by congressional failure to extend to its own employees the protection of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (1976), the primary legislation dealing with the national problem of employment discrimination.

[3] The House Fair Employment Practices Committee, comprised of six of the *amici*, is empowered to handle only those complaints filed against Members of Congress who have signed the voluntary Fair Employment Practices Agreement. *See* Handling of Discrimination Complaints in the Senate, Hearings Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., August 3, 1977 at 25-32. It has been suggested that those Members who have signed the agreement are the Members least likely to discriminate. *Id.* at 32.

(Comm. Print 1977). Included in the numerous recommendations were several concerning fair employment practices. The Obey Commission proposed, *inter alia*, amending House rules to broaden antidiscrimination provisions, establishing an affirmative action recruitment program, and establishing a Fair Employment Practices Panel consisting of three Members of Congress. The panel was to have provided non-binding conciliation services in cases alleging discrimination by Members. *See* H.R. Res. 766, 95th Cong., 1st Sess., §§ 101(6)(b)(8), (9), (10), (11), 504 (1977); Commission on Administrative Review, Recommendations and Rationales, *supra*, at 3, 49-53. These limited proposals were prevented from reaching the House floor when the House defeated, by a 252 to 160 vote, the Rule which would have governed consideration of the Obey Commission's resolution. 123 Cong. Rec. H10819-28 (daily ed. October 12, 1977).

The other attempt to create an effective procedure for resolving complaints of employment discrimination in the House was the introduction of House Resolution 1380 on September 25, 1978. 124 Cong. Rec. H10697 (daily ed. September 25, 1978). That resolution called for implementation of clause 9 of Rule XLIII, an existing House antidiscrimination provision.[4] House Reso-

[4] Clause 9 of Rule XLIII, adopted on January 14, 1975, 121 Cong. Rec. 22 (1975) provides:

> A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Because of burdensome procedures which prohibit a non-Member from bringing a case before the Committee on Standards of Official Conduct unless three Members of the House have signed letters refusing to bring the case, the Obey Commission described the antidiscrimination section as "all but unenforceable" in explaining its recommendation for a Fair Employment Practices Panel. Commission on Administrative Review, Recommendations and Rationales, *supra*, at 53.

lution 1380 called for the establishment of "a House Fair Employment Relations Board, a House Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations" of the House Rules' antidiscrimination clause. H.R. Res. 1380, 95th Cong., 2d Sess., § 2 (1978). The resolution was referred to the House Committees on Administration and Rules; neither Committee reported the resolution and the House therefore failed to consider it before adjournment.

2. Senate

Senate Resolution 431, identical to House Resolution 1380, was also not considered by the full Senate, despite hearings revealing extensive employment discrimination in Congress and a favorable report by the Senate Governmental Affairs Committee. *See* Handling of Discrimination Complaints in the Senate, Hearing Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., August 3, 1977, and 2d Sess., February 9, 1978; S. Rep. No. 729, 95th Cong., 2d Sess. (1978). Senate Resolution 431, like its House counterpart, sought to implement the provisions of an antidiscrimination rule which had been adopted with no effective enforcement mechanism.[5] Favorably reported on

[5] Senate Rule L(50), adopted April 1, 1977 as part of a new Code of Official Conduct, 123 Cong. Rec. S5381-406 (daily ed. April 1, 1977), goes into effect on January 3, 1979. It provides:

> No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—
>
> (a) fail or refuse to hire an individual;

April 7, 1978, the Resolution did not reach the floor of the Senate until October 11, 1978, when it was introduced and debated as an amendment to the Full Employment and Balanced Growth Act of 1978 (the "Humphrey-Hawkins Bill"). 124 Cong. Rec. S18206-11, S18226-29, S18235-49, S18250-51, S18278-80 (daily ed. October 11, 1978). Two days later the resolution was withdrawn to facilitate passage of the Humphrey-Hawkins Bill. 124 Cong. Rec. S18873-74 (daily ed. October 13, 1978). The resolution was not reconsidered before adjournment.

Thus, Congress has failed to implement the antidiscrimination policies it has adopted.[6] This Court has clearly held that the fifth amendment provides protection against sex discrimination by the federal government. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v.

(b) discharge an individual; or

(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

The Governmental Affairs Committee, in favorably reporting Senate Resolution 431, noted that Rule L "will not be an effective deterrent to employment discrimination unless procedures are established for the resolution of discrimination complaints." S. Rep. No. 729, *supra*, at 5. Many of the people who testified before the Committee commented on the ineffectiveness of an antidiscrimination rule with no means of enforcement. *See, e.g.*, Handling of Discrimination Complaints in the Senate, *supra*, August 3, 1977 at 9 (Testimony of Senator Brooke), 11 (Testimony of Senator Abourezk).

[6] Even had Congress enacted the measures discussed in this brief, petitioner would be unable to avail herself of whatever benefits they might have provided, as respondent is no longer a Member of Congress.

Richardson, 411 U.S. 677 (1973). If petitioner is to have such protection, it will have to come from the courts.

B. Judicial Relief Has Not Been Foreclosed By Congress

1. Recent Senate and House Action

Congress's failure to provide an administrative procedure to handle its employees' complaints of discrimination does not affect the availability of judicial relief for such complaints.

The effect of Senate Resolution 431 on judicial relief was explicitly considered. The Governmental Affairs Committee viewed its proposed procedures as supplementing existing avenues of judicial relief rather than as replacing them or providing additional federal jurisdiction. For instance, the Committee's staff draft of the resolution, presented by Senator Glenn at the February 9, 1978 hearings, contained the following discussion:

> *Question 1.* Is it possible that these remedies might preempt other potentially applicable legal remedies—thus inadvertently establishing an exclusive sanction? Or, are we at least creating an exhaustion of remedies requirement?
>
> Answer. I believe that our intent here is not to limit Federal jurisdiction or to preclude other remedies. All access to the judicial process should continue. However, since courts have recognized the desirability of building an "agency record," and often value in-agency expertise, I believe that we do, by our resolution, create [an] exhaust your remedies requirement before entering court except where the administrative remedy is inadequate.
>
> *Question 2.* Do our procedures act to provide a further basis for Federal jurisdiction?
>
> Answer. Probably not, Senate rules say that a simple resolution relating to internal procedures is

> not "law" so this resolution by itself, gives no immediate entry into court.

Handling of Discrimination Complaints in the Senate, *supra*, February 9, 1978, at 4. *See also id.* at 60-81 (Legal Analysis of Various Questions with Regard to the Draft Resolution, prepared by the Congressional Research Service of the Library of Congress).

Moreover, the hearings and report contain numerous references to the original Fifth Circuit panel's decision in this litigation, recognizing petitioner's cause of action. *See, e.g.,* S. Rep. No. 729, *supra,* at 8; Handling of Discrimination Complaints in the Senate, *supra,* August 3, 1977, at 8-9, 126, 130, and February 9, 1978, at 15, 95, 321-37, referring to *Davis* v. *Passman,* 544 F.2d 865 (5th Cir. 1977). Thus, the Committee considering the resolution was aware of the judicial remedy approved by the Fifth Circuit's original decision and expressed no disapproval or desire to limit its effect. The Senate's failure to consider Senate Resolution 431 because of political considerations related to the Humphrey-Hawkins Bill can not reasonably be interpreted as limiting judicial relief.[7]

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[7] Since none of the three resolutions (S.Res. 431 and H.R. Res. 766 and 1380) was ever considered on its merits, *see* pp. 5-8 *supra,* congressional inaction can not be interpreted as a statement of congressional intent to foreclose judicial remedies for employment discrimination. *See generally* FTC v. Dean Foods Co., 384 U.S. 597, 609-10 and n.11 (1966); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942).

There is less explicit evidence regarding the effect of the two House proposals on the availability of judicial relief. The Obey Commission's fair employment proposals were a small part of the Commission's effort to revamp House administration and were accompanied by comparatively little explanatory material. The Commission's focus on the internal operations of the House makes it unlikely that the Commission intended its proposals to affect the availability of judicial relief. House Resolution 1380 was never the subject of hearings, committee reports, or floor debate. *See* pp. 6-7 *supra.* It was, however, identical to Senate Resolution 431 and nothing indicates that it was perceived as having a different effect than the Senate resolution, which was viewed as an internal mechanism, independent of judicial relief. Thus, the House's inaction on these resolutions, to the degree that it can be interpreted at all, can certainly not be viewed as foreclosing judicial relief.

2. Title VII

It should also be noted that the omission of congressional employees from the provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (1976) does not foreclose an action based on a constitutional claim of sex discrimination. First, in order for a court to conclude that Congress has taken a step as serious as barring access to the courts for violations of constitutional rights, congressional intent must be clear and unambiguous.[8] Silence is neither clear nor unambiguous [9] and, particularly in the absence of an alternative remedy, should not be interpreted as carrying significant implications.

---

[8] *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971):

> [W]e have here no *explicit congressional declaration* that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

(Emphasis supplied.) *See also* Marbury v. Madison, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

[9] *See* n.7 *supra.*

Second, to interpret Title VII as completely foreclosing judicial relief for congressional employees would be inconsistent with the policy against federal employment discrimination on the basis of race, color, religion, sex, or national origin enunciated by Congress in 5 U.S.C. § 7151 (1976). Congressional employees are considered federal employees for the purposes of that statute. 5 U.S.C. §§ 2101(1), 2105(a)(1)(B). Interpreting Title VII inconsistently with 5 U.S.C. § 7151 would violate the principle that courts should interpret statutes to reconcile apparent inconsistencies, and should give effect to both statutes. *See United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Wilderness Society* v. *Morton*, 156 U.S. App. D.C. 121, 479 F.2d 842 (1973), *cert. denied*, 411 U.S. 917 (1973). Omission of congressional employees from Title VII means only that they have no access to the specific procedures established by Title VII, and not that those employees have been totally denied judicial relief for violations of their constitutional rights.[10]

Third, this Court has concluded that inclusion in Title VII is not a prerequisite to an action for unconstitutional employment discrimination. In *Hampton* v.

[10] This Court has reviewed Title VII's legislative history and concluded that federal employees were initially excluded because of congressional doubts as to the availability of effective judicial relief against the federal government. Brown v. GSA, 425 U.S. 820, 825 (1976). That conclusion does not support the argument that Congress intended to foreclose any relief that might exist. This Court declined to assess the correctness of the congressional concern about the availability of relief. *Id.* at 828. Certainly, the Court's holding in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), indicates that some of the congressional fears were unfounded. This fact is reflected in Senate references, during consideration of S.Res. 431, to the availability of judicial relief for constitutional violations by the federal government. *See* pp. 9-10 *supra*.

Mow Sun Wong, 426 U.S. 88 (1976), the Court held that aliens had a cause of action under the fifth amendment for employment discrimination by the federal government. Title VII does not protect employees from discrimination on the basis of alienage.[11] Thus, *Hampton* v. *Mow Sun Wong* demonstrates that omission from Title VII does not bar an individual from the access to the courts necessary to effectuate his or her constitutional rights.[12] The holding of *Brown* v. *General Ser-*

[11] Title VII prohibits employment discrimination because of "race, color, religion, sex, or national origin." § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976).

[12] In the Fifth Circuit en banc decision, the court stated, "Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in the noncompetitive service, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect." Davis v. Passman, 571 F.2d 793, 798 (5th Cir. 1978). That statement reflects several misconceptions. First, it is difficult to understand why the Fifth Circuit described the constitutional remedies available to congressional employees as being "far more extensive" than those provided for by Title VII. Title VII gives a plaintiff access to both administrative and judicial redress, the latter of which may include, but is not limited to, enjoining the unlawful practice, ordering appropriate affirmative action such as the reinstatement or hiring of employees, back pay, and any other equitable relief deemed appropriate. §§ 706, 717 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-16 (1976).

Second, the fact that Congress did not extend Title VII to its employees does not mean that it intended to leave them totally unprotected, no matter how flagrant the constitutional violation, or even that it intended to leave them significantly less protected than other employees. The omission merely means that Congress chose not to use the particular procedures set out in Title VII. *See* pp. 11-12 *supra*.

Third, the Fifth Circuit seems, in its statement, to be assuming that all complaints of federal employment discrimination must be resolved in the same way. It is, however, a well-established principle that a statute need not address all aspects of a given problem. Railway Express Agency v. New York, 336 U.S. 106 (1949).

vices Administrationtion, 425 U.S. 820 (1976), is not inconsistent with this result. Although *Brown* held that § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, is the exclusive judicial remedy for employment discrimination claims by those federal employees covered by the Act, *Brown* did not address the case of those, such as congressional employees, for whom the Act provides no remedy.

Congress has failed to provide meaningful internal procedures by which to resolve employment discrimination complaints against its Members. There is no indication—in the record or otherwise—that it will do so in the near future. Therefore, in the absence of other remedial legislation, actions such as petitioner's are critical to the ability of congressional employees to enforce their fifth amendment rights.

II. THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE MEMBERS OF CONGRESS FROM SUIT FOR DISMISSALS OF CONGRESSIONAL STAFF ON THE BASIS OF SEX.

Respondent has raised sovereign and official immunity as absolute defenses to this action.[13] The district court's opinion and the original decision of the Fifth Circuit held both such defenses clearly inapposite and neither merits further discussion.[14] *Amici* will therefore

[13] If respondent is entitled to qualified immunity, *see* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), then petitioner would still be entitled to a trial on the merits. Imbler v. Pachtman, 424 U.S. 409, 419 nn.13, 14 (1976).

[14] Petitioner's claim for damages is not one which would impinge upon the United States Treasury, but rather is one against respondent personally. Therefore, no question of sovereign immunity is presented. The doctrine of absolute official immunity is similarly unavailable. The common law privilege of absolute immunity for the legislative acts of legislators was incorporated into the speech

address the sole theory of immunity arguably available to respondent in support of his motion to dismiss, *i.e.*, that provided by the speech or debate clause of the United States Constitution.

As Members of Congress and the House of Representatives Fair Employment Practices Committee, *amici* do not believe that legislative immunity for unconstitutional dismissals of congressional staff employees is necessary for the proper functioning of Congress. There exists no legal or other reason for the Court to extend this doctrine beyond the legitimate legislative activities it was intended to protect to administrative functions which are merely incidental to the legislative process. Such an extension would be singularly inappropriate in a case such as this which involves a substantial intrusion upon important rights.

This Court has recognized that the immunity provided by the speech or debate clause is limited. The purpose of the clause is to protect the Members of Congress "against prosecutions that directly impinge upon or threaten the legislative process." *Gravel* v. *United States*, 408 U.S. 606, 616 (1972), *reh. denied*, 409 U.S. 902 (1972). It protects solely those actions "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880).

or debate clause of the United States Constitution, Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951), and is coterminous with the immunity provided by that clause. *See* Doe v. McMillan, 412 U.S. 306, 324 (1973) (Members of Congress are absolutely immune when legislating but enjoy no absolute immunity when they act outside the legitimate legislative process). *See also* Butz v. Economou, 46 U.S.L.W. 4952 (U.S. June 29, 1978).

The speech or debate clause was not "written into the Constitution simply for the personal or private benefit of Members of Congress." *United States* v. *Brewster*, 408 U.S. 501, 507 (1972). It was not intended to immunize legislators against all litigation, but only that connected with a legislative act and the integrity of the legislative process. Nor was the clause intended to grant legislators an unrestricted immunity from prosecution for all acts performed while in office but only to ensure the independence of the legislative branch. Consequently, courts have refused to extend its reach to activities incidental to performance of strictly legislative tasks, *e.g.*, to actions taken in running a congressional office.[15]

The respondent therefore errs in suggesting that since the work of congressional aides may be related to

[15] Several authorities hold that suits against Members of Congress and their aides arising out of activities which are marginally related to the legislative process are not barred by the speech or debate clause. *See* Gravel v. United States, 408 U.S. at 625 (public dissemination of materials gathered by committees); United States v. Brewster, 408 U.S. at 512-16 (issuing news releases, delivering speeches outside Congress and making appointments with government agencies); United States v. Johnson, 383 U.S. 169, 172 (1966) (contacts with administrative agencies and executive officials with respect to the administration of federal statutes); Hutchinson v. Proxmire, Nos. 77-1677, 77-1755, slip op. at 625 (7th Cir. June 30, 1978) (defamatory remarks in public interviews concerning wasteful government spending); United States ex rel. Hollander v. Clay, 420 F.Supp. 853, 855-56 (D.C. Cir. 1976) (making of vouchers for travel connected with representing and communicating with a constituency); Hoellen v. Annunzio, 348 F.Supp. 305, 314 (N.D. Ill.), *aff'd*, 468 F.2d 522, 527 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) (use of the franking privilege). *See generally* United States v. Gillock, No. 77-5335 (6th Cir. Nov. 1, 1978). These incidental legislative activities for which immunity has been denied are certainly more closely associated with the legislative process than the discriminatory discharging of a staff employee.

the functioning of the legislative process, the decision of a Member of Congress to hire or discharge a staff member is a legislative act immune from judicial scrutiny under the speech or debate clause. Resp. at 5. If an aide performs a task which is intimately related to the legislative function, such as helping a Member conduct committee hearings, then he should be cloaked with legislative immunity for that act. *See Gravel* v. *United States*, *supra*. However, the hiring or discharge of such an employee in itself is not an activity "essential to legislating" or an "integral part" of the legislative process. *See id.* at 621, 625. Absent such an intimate relationship with the legislative process, an act may not be considered immune under the speech or debate clause.

That the hiring and firing of congressional employees may be tangentially related to the legislative process is immaterial. This Court has made it clear that not "everything that relate[s] to the office of a Member [is] shielded by the Clause. Quite the contrary . . . only acts generally done in the course of the process of enacting legislation [are] protected." *United States* v. *Brewster*, 408 U.S. 501, 513-14 (1972). As was observed in *Brewster*,

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process . . . . Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to relate to the legislative process . . . . In every case thus far before this Court, the speech or debate clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.

Id. at 515-16 (emphasis in original). Thus, the clause does not prohibit inquiry into conduct merely because it has a nexus to legislative functions or because that conduct is casually or incidentally related to legislative affairs.

Amici recognize the strong interest of Congress in ensuring that its Members possess broad discretion in the hiring and dismissal of their staff employees. That interest is amply protected by 2 U.S.C. § 92, which permits Members of Congress to remove personal staff employees "at any time . . . with or without cause." That interest is not sufficient, however, to warrant the extension of a constitutional immunity, granted for a limited purpose, to dismissals of staff on sexually discriminatory or any other constitutionally impermissible grounds.

To accept respondent's assertion that he has absolute immunity from claims that he violated the constitutional rights of his staff members in the hiring or firing process would extend immunity far beyond legislative activities to actions which a Member of Congress takes not as part of the legislative process but as an ordinary citizen, in this case as an employer. The speech or debate clause absolutely protects the legislative process, not the individual legislator. That process is not endangered by refusing to extend immunity to an unconstitutional dismissal of a congressional employee. Immunity for such actions is not only unnecessary to preserve the integrity of the legislative process, but actually subverts the intent of the framers in providing this constitutional immunity by granting legislators the unlimited privilege to flout indiscriminately constitutional rights which they have sworn to uphold and have caused to be enforced against every other segment of the American public.

The speech or debate clause must be construed not in isolation but in the light of the entire constitutional scheme. When the action complained of infringes significant constitutional rights, as here, this Court should interpret the scope of the activities protected by that clause narrowly and not in the expansive sense advocated by respondent.

Amici neither desire nor find desirable the extension of legislative immunity to the unconstitutional dismissal of congressional staff employees. More important, they disagree with the contention that such immunity is essential to the proper functioning of the legitimate legislative process. Respondent has entirely failed to demonstrate that the broad application of speech or debate immunity he advocates would ensure the independence of that process rather than merely provide individual legislators with the freedom to discriminate on the basis of sex. Therefore, his claim of speech or debate immunity should be denied.

CONCLUSION

For the foregoing reasons, the en banc decision of the United States Court of Appeals for the Fifth Circuit should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Brief for the Honorable Morris Udall, *et al.*, *Amici Curiae*, were mailed, first class mail, postage prepaid, this 14th day of December, 1978 to each of the following:

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APPENDIX

APPENDIX

LAW OFFICES
BEVERIDGE, FAIRBANKS & DIAMOND

December 4, 1978

Ms. Sana F. Shtasel
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Re: Shirley Davis v. Otto E. Passman
No. 78-5072

Dear Ms. Shtasel:

Pursuant to our telephone conversation, I am writing to request your consent to our filing a brief *amici curiae,* in the United States Supreme Court, on behalf of the Hon. Morris Udall, the Hon. Patricia Schroeder, the Hon. Charles Rose, the Hon. George Miller, the Hon. Robert Carr and other members of Congress, and Carla Kish, Winnie Burrell and Bruce Kriegman, in the above-captioned case.

If you do consent as requested in this letter, please indicate by signing below.

Sincerely,

/s/ CYNTHIA A. LEWIS
Cynthia A. Lewis

On behalf of petitioner, I consent to the above.

/s/ SANA F. SHTASEL
Sana F. Shtasel

/s/ PETER BARTON HUTT
Peter Barton Hutt
Attorneys for Petitioner

LAW OFFICES
HUDSON, POTTS & BERNSTEIN

December 4, 1978

Honorable Michael Rodak, Jr., Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: Shirley Davis
Vs.
Otto E. Passman

Dear Mr. Rodak:

On behalf of Otto E. Passman, this is to advise that the undersigned has no objection to the filing of a brief as an amicus curiae by (1) The Honorable Morris Udall, Charles Rose, Patricia Schroeder, George Miller, Robert Carr and the Fair Employment Practices Committee and (2) The American Civil Liberties Union.

Very truly yours,

HUDSON, POTTS & BERNSTEIN
/s/ A. RICHARD GEAR
A. Richard Gear